United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,387 359

TELESYSTEMS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

PHILADELPHIA TELEVISION BROADCASTING CO., ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC., and WESTINGHOUSE BROADCASTING COMPANY, INC.,
Intervenors.

Appeal from a Decision and Order of the Federal Communications Commission

April 5, 1967

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

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HOGAN & HARTSON
815 Connecticut Avenue
Washington, D. C. 20006

May 20, 1966

The Secretary
Federal Communications Commission
Washington, D. C. 20554

Attention: CATV Division

Dear Sir:

On behalf of TeleSystems Corporation, we transmit herewith a statement of intention to commence the operation of CATV systems in Springfield Township, Pennsylvania and other neighboring communities.

If there are any questions regarding the above, please communicate with this office.

Respectfully,

HOGAN & HARTSON

By /s/ Jay E. Ricks
Attorneys for TeleSystems Corporation

JER:b
Enclosure

May 16, 1966

The Secretary
Federal Communications Commission
Washington, D. C. 20554

Dear Sir:

TeleSystems Corporation hereby submits a statement of its intention to commence the operation of CATV systems in East Norriton Township, Springfield Township, Borough of Conshohocken, Marple Township, Horsham Township and the Borough of North Wales, Pennsylvania. All of the foregoing communities may be at least in part within the Grade A contour of one or more of the television stations in Philadelphia, Pennsylvania.

TeleSystems proposes to deliver to its CATV subscribers the signals of the following television stations: KYW-TV, WFIL-TV, WCAU-TV, WPHL-TV, WIBF-TV, WUHY-TV, all Philadelphia, Pennsylvania; WHYY-TV, Wilmington, Delaware; WNEW-TV, WOR-TV and WPIX, all New York, New York. Although the latter three stations do not place a predicted Grade B signal over the communities involved, their signals are receivable off-the-air by TeleSystems at its antenna which is located in Springfield Township.

TeleSystems recognizes that the commencement of its proposed CATV service apparently will be inconsistent with certain Rules and Regulations of the Commission relating to the distribution of television broadcast signals by community antenna television systems which were adopted in the Commission's Second Report and Order in Docket 15971.

However, on April 18, 1966 TeleSystems filed with the Commission a "Petition for Reconsideration" of the Second Report and Order. The petition recited the fact that

TeleSystems holds franchises which authorize it to construct and operate CATV systems in six communities located near Philadelphia, Pennsylvania. The petition further states as follows:

[3]

"The expenses incurred by TeleSystems in prosecuting the subject franchises to date have exceeded $150,000. In order to comply with commitments connected with those franchises, TeleSystems has leased space on an existing tower in Springfield Township at a total ten-year cost of $116,000, and has constructed antennae, head-end equipment, a head-end building, and some main trunk line, all at considerable cost. TeleSystems also has negotiated and/or executed contracts with the telephone and power companies. These contracts have fixed liabilities, and the pole lease agreements with the telephone company will become void if TeleSystems fails to proceed with timely construction. The CATV franchises granted to TeleSystems also contain forfeiture clauses, to become operative in the event system construction does not proceed within certain specified periods of time."

TeleSystems' petition requested the Commission to declare its CATV rules invalid for the following reasons:

"(a) The Commission has no jurisdiction over non-microwave CATV systems which are located wholly within the confines of a single state;

(b) The Commission has no jurisdiction to limit or control the reception of available off-the-air television signals;

(c) The Commission's rules which undertake to limit the right of a CATV system to distribute certain off-the-air television signals are in vio-

lation of the freedom of speech guaranteed by the first Amendment to the United States Constitution; and

(d) The Commission's rule which places a severe and onerous burden on CATV systems which proposed to operate in the top 100 television markets was adopted on an inadequate record and is unreasonable and discriminatory."

The legal arguments in support of the foregoing reasons are detailed in TeleSystems' "Petition for Reconsideration," a copy of which is attached hereto.

[4]

TeleSystems has reviewed the current proceedings before the Commission and the courts which deal with various aspects of the Commission's recent attempts to regulate all CATV activities and TeleSystems is convinced that substantial periods of time will expire before a final judicial determination of the legality of the Commission's CATV rules is rendered. As noted *supra*, TeleSystems will suffer severe and irreparable injury as a consequence of its failure to proceed with the timely construction and operation of its franchised CATV systems.

TeleSystems also believes that the facts with respect to its CATV operations differ materially from those in cases now pending before the Commission or the courts, and that intervention in any such cases would be prejudicial to TeleSystems.

Accordingly, as a means of obtaining a timely judicial decision on the merits of its case alone, TeleSystems has determined to commence the operation of CATV systems as heretofore described. In order to properly raise justiciable issues with respect to the Commission's present jurisdiction over TeleSystems' proposed operations, and the legality of the rules which purport to forbid such

operations, TeleSystems has not sought prior Commission approval as provided in Section 74.1107(a) of the Rules. Similarly, TeleSystems has not given notification to television stations of the commencement of CATV services as would be required by Section 74.1105 of the Rules.

TeleSystems, however, does not seek to frustrate the objectives of a regulatory agency and will cooperate fully with the Commission in bringing this matter before a proper tribunal for a decision on the merits at the earliest possible date.

Respectfully,

TELESYSTEMS CORPORATION
113 South Easton Rd.
Glenside, Pennsylvania

By /s/ Fred Lieberman
President

[5]

May 23, 1966

The Secretary
Federal Communications Commission
Washington, D. C. 20554

Attention: CATV Division

Dear Sir:

This is in reference to the letter of TeleSystems Corporation dated May 16, 1966, concerning its intention to commence the operation of CATV systems in Springfield Township, Pennsylvania, and other neighboring communities which was filed with the Commission on May 20, 1966.

In addition to the signals identified on page one of that letter, TeleSystems is delivering to subscribers the signal of Station WKBS, Burlington, New Jersey.

Service to subscribers in Springfield Township commenced on May 18, 1966.

Respectfully,

HOGAN & HARTSON

By /s/ Jay E. Ricks
Attorneys for TeleSystems Corporation

JER:krd
bc: Mr. Fred Leiberman

[6]

LAW OFFICES OF
COTTONE AND FANELLI
1001 Connecticut Avenue
Washington 36, D. C.

May 24, 1966

Honorable Ben F. Waple,
Secretary,
Federal Communications Commission
Washington, D. C. 20554

IN RE: Telesystems Corporation

Dear Sir:

This has reference to the letter dated May 16, 1966, of the above company, proposed operator of CATV systems in various communities which are within the Grade A contour of UHF Station WPHL-TV, Philadelphia, Pa., which is authorized to and operated by Philadelphia Television Broadcasting Company. In its letter, Telesystems Corporation has notified the Commission of its intention to proceed to place such systems in operation without notification to us as required by Section 74.1105 or without prior Commission approval as required by Section 74.1107(a) of the Commission's Rules.

Serious economic injury will be caused to Station WPHL-TV by the proposed operation of such systems, particularly because the carriage of the programs of several New York City stations on said CATV systems will fragment WPHL-TV's viewing audience. In view of this fact, and in view of Telesystems Corporation's admission of its intention to violate said Commission Rules, it is respectfully requested that the Commission forthwith order Telesystems Corporation to cease and desist from

such intended violations and make Philadelphia Television Broadcasting Company a party to any proceedings instituted pursuant to such order.

Respectfully submitted,

PHILADELPHIA TELEVISION
BROADCASTING COMPANY

By .....
BENEDICT P. COTTONE
Its Attorney

cc: HOGAN & HARTSON
Attorneys for Telesystems Corporation

[7]

FCC 66-477
83992

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

Docket No. 16666

IN THE MATTER OF

Cease and Desist Order to be directed against TELE-SYSTEMS CORPORATION, owner and operator of a community antenna television system at Springfield Township, Pennsylvania

ORDER TO SHOW CAUSE

By the Commission: Commissioner Bartley concurring and issuing a statement; Commissioner Loevinger absent.

1. The Commission has under consideration the issuance of an order directed against TeleSystems Corporation (hereafter TeleSystems), owner and operator of a community antenna television system at Springfield Township, Pennsylvania, to show cause why it should not be required to cease and desist from operations in violation of Sections 74.1105 and 74.1107 of the Commission's Rules and Regulations promulgated under the Communications Act of 1934, as amended. By letters dated May 16, 1966 and May 23, 1966, the Commission was notified of TeleSystems' intent to operate its CATV system and details of commencement of such operations at Springfield Township.[1]

[1] On May 24, 1966, Station WPHL-TV, Philadelphia, Pennsylvania, by letter, requested the Commission to issue a cease and desist order against TeleSystems' intended violation. WPHL-TV requested to be made a party to any proceedings but since its showing in support is inadequate, its request will be denied without prejudice to its right to make a further showing in support of intervention.

2. From the information before the Commission, the relevant facts appear to be as follows: TeleSystems, a CATV system within Section 74.1101(a) of the Commission's Rules, began carrying the signals of three (3) television broadcast stations beyond their predicted Grade B contours after February 15, 1966. TeleSystems was authorized to provide CATV service in Springfield Township and pursuant to its franchise, TeleSystems began service on May 18, 1966. The following "distant signals" as defined in Rule Section 74.1101(i) are being provided:

WNEW-TV, Channel 5	New York City, New York
WOR-TV, Channel 9	New York City, New York
WPIX, Channel 11	New York City, New York

Springfield Township is located beyond the predicted Grade B contours of all the foregoing stations. TeleSystems is also supplying to its subscribers the signals of Television Broadcast Stations KYW-TV, Channel 3;

WFIL-TV, Channel 6; WCAU-TV, Channel 10, WIBF-TV, Channel 29; and WUHY-TV, Channel 35, Philadelphia, Pennsylvania; WHYY-TV, Channel 12, Wilmington, Delaware; and WKBS, Channel 48, Burlington, New Jersey.[2] Philadelphia is ranked by the American Research Bureau as the 4th "television market" based on net weekly circulation figures for 1965. Springfield Township is within the predicted Grade A contours of several Philadelphia stations.

3. On March 8, 1966, the Commission adopted rules for the regulation of all CATV systems. The rules are set forth in the Commission's Second Report and Order in Docket Nos. 14895, 15233 and 15971 (FCC 66-220), 2 FCC 2d 725, which was published in the Federal Register on March 17, 1966 (31 F.R. 4540). Section 74.1107

[2] WKBS is currently operating under special temporary authority.

of the rules sets forth certain requirements and procedures for CATV systems operating in the 100 highest ranked television markets as determined by the American Research Bureau net weekly circulation figures for the most recent year, and provides in substance, insofar as pertinent here, that effective upon publication in the Federal Register (March 17, 1966) no CATV system commencing operation after February 15, 1966, and located within the predicted Grade A contour of a television station in one of the 100 largest television markets, shall provide service to subscribers which would extend the signal of any television station beyond its Grade B contour, except upon a showing, made in evidentiary hearing and approved by the Commission, that such extension of the signal would be consistent with the public interest. The request for an evidentiary hearing is to be made by the CATV system and shall contain the information specified in the rule.[3]

4. TeleSystems has not sought an evidentiary hearing pursuant to Section 74.1107, but is violating the provisions of that Section. By its own admission, the system has not sought prior Commission approval under Section 74.1107(a), in order to "properly raise justiciable issues with respect to the Commission's present jurisdiction over TeleSystem's proposed operations, and the legality of the

[3] On February 15, 1966, the Commission had issued a Public Notice (No. 79927) announcing its intention to regulate CATV systems. The Commission announced that it was asserting jurisdiction over all CATV systems, whether or not served by microwave relay, and that persons obtaining state or local franchises to operate CATV systems in the 100 highest ranked television markets, where the system would extend the signals of television broadcast stations beyond their Grade B contours, would be required to obtain Commission approval before such CATV service to subscribers could be commenced. It was announced at that time that an evidentiary hearing would be held as to all such requests for Commission approval, subject to the general waiver provisions of the Commission's Rules. Notice was given that this aspect of the Commission's regulatory program would be applicable to all CATV operations commenced after February 15, 1966.

rules which purport to forbid such operations . . ." Similarly, TeleSystems has not given notification to television stations pursuant to Section 74.1105 of the Rules. This section requires, in part, that effective March 17, 1966, no CATV system shall commence operations, or commence supplying to its subscribers the signal of any

television broadcast station carried beyond the Grade B contour of that station, unless the CATV system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watt or higher power translator station operating in the community of the system. TeleSystems, by its own admission, has not given such notification to television stations as required under this section. The Commission noted in this connection that TeleSystems incorporates by reference the "Petition for Reconsideration" of the Second Report and Order filed by it on April 18, 1966.[4]

5. In the Second Report and Order we indicated that we would take action expeditiously in the event of a violation of Section 74.1107 of the Rules. We acknowledged "the very great desirability" of avoiding the disruption of CATV service to the public which would result from action applicable to an operating CATV system. Clearly, time is of the essence here. This part of the rules was made effective upon publication so that the Commission could proceed forthwith against any system contravening

[4] In its petition, TeleSystems contends that the rules are invalid because the Commission lacks jurisdiction over non-microwave systems located wholly within one state, because it lacks jurisdiction to control reception of available off-the-air television signals, and because the rules are unreasonable, descriminating [*sic*] and violate the First Amendment to the U. S. Constitution.

the rules. The public interest requires that insofar as possible the situation in Springfield Township be held in status quo. The Commission finds that due and timely execution of its functions in this matter imperatively and unavoidably require that the Examiner certify the record, upon its closing, immediately to the Commission for final decision. Expedition also requires that the parties file their proposed findings of fact and conclusions of law within seven (7) calendar days after the date the record is closed. We note in connection with the imposition of this time schedule that there is only one issue to be resolved, i.e., compliance with the rules.

6. IT IS ORDERED, This 25th day of May, 1966, That pursuant to Sections 312(b) and (c) and 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. 312(b) and (c), and 409(a) TeleSystems Corporation IS DIRECTED TO SHOW CAUSE why it should not be ordered to cease and desist from further operation of its CATV system in Springfield Township, in violation of Sections 74.1105 and 74.1107 of the Commission's Rules.

[10]

7. IT IS FURTHER ORDERED, That TeleSystems Corporation is directed to appear and to give evidence with respect to the matters cited above at a hearing[5] to

[5] Section 1.91(c) of the Commission's Rules provides that a respondent in order to avail itself of the opportunity to be heard shall, in person or by its attorney file with the Commission within thirty days of the receipt of the Order to Show Cause, a written statement stating that it will appear at the hearing and present evidence on the matter specified in the Order. If the respondent fails to file an appearance within the time specified, the right to a hearing shall be deemed to have been waived. Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty days of the receipt of the Order to Show Cause. In the event the right to a hearing is waived, the Review Board shall terminate the hearing proceeding and certify the case to the Commission. Thereupon the matter will be determined by the Commission.

be held at Washington, D. C., at a time and before an Examiner to be specified by subsequent Order, unless the hearing is waived, in which event a written statement may be submitted.

8. IT IS FURTHER ORDERED, That, the request of Philadelphia Television Broadcasting Company (WPHL-TV) to be made a party to this proceeding IS DENIED without prejudice to its right to renew its request upon a further showing.

9. IT IS FURTHER ORDERED, That upon the closing of the record it shall be certified immediately to the Commission for final decision, and that the parties hereto shall file proposed findings of fact and conclusions of law within seven (7) days after the date the record is closed.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of the Order by Certified Mail—Return Receipt Requested, to TeleSystems Corporation and to Philadelphia Television Broadcasting Company (WPHL-TV).

FEDERAL COMMUNICATIONS COMMISSION *

BEN F. WAPLE
Secretary

[SEAL]

Released: May 27, 1966

* See attached statement of Commissioner Bartley.

[11]

STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I concur in the issuance of this Order to the extent that it provides a means of obtaining a timely judicial decision on the merits of the case at the earliest possible date, as desired by the respondent.

I support the respondent's Petition For Reconsideration of the CATV rules for the reasons set forth in my dissent to the Commission's Decision this day in Docket No. 16551, which dissent is incorporated herein by reference and is attached hereto.

[14]

84713

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

Docket No. 16666

IN THE MATTER OF

Cease and Desist Order to be directed against TELE-SYSTEMS CORPORATION, owner and operator of a community antenna television system at Springfield Township, Pennsylvania

ERRATUM

Attached hereto is the Statement of Commissioner Robert T. Bartley which was attached to the Order to Show Cause previously issued in the above-entitled matter (FCC 66-477, Mimeo No. 83992). The Dissent to the Commission's Decision in Docket No. 16551, which was incorporated by reference and omitted from the orginal Order to Show Cause, is also attached.

FEDERAL COMMUNICATIONS
COMMISSION

BEN F. WAPLE
Secretary

Attachments

Released: June 1, 1966

[SEAL]

[15]

STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I concur in the issuance of this Order to the extent that it provides a means of obtaining a timely judicial decision on the merits of the case at the earliest possible date, as desired by the respondent.

I support the respondent's Petition For Reconsideration of the CATV rules for the reasons set forth in my dissent to the Commission's Decision this day in Docket No. 16551, which dissent is incorporated herein by reference and is attached hereto.

[16]

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. In the absence of Congressional action, I agree with the respondent's contention that the Commission does not have jurisdiction over CATV systems and that, consequently, the rules adopted in the *Second Report and Order* are invalid. Even assuming arguendo that the Commission does have jurisdiction, I believe that Section 74.1107 of the rules is invalid because it contravenes Section 4(c) of the Administrative Procedure Act, which provides that a substantive rule not be made effective in less than 30 days after required publication "except as otherwise provided by the agency upon good cause found and published with the rule."

Section 74.1107 was made effective immediately upon the required publication. A recitation of "good cause found" was made on the basis of injury to the public from continued implementation of service extending Grade B signals.

In my opinion, injury to the public was not supported with any factual indication or showing and was purely unfounded speculation. There appeared to be more indication of benefit, rather than injury, to the public from the extended service in question. Consequently, the recitation of "good cause found" was, I believe, a nullity under Section 4(c) of the Administrative Procedure Act, and the immediate effective date of the rule rendered it invalid.

The February 15th cut-off date of Section 74.1107(d) appears in practical operation to be a retrospectively applied effective date of the rule itself and, accordingly, a further ground for invalidity of the rule.

Moreover, I believe that Section 74.1107 is not valid because adequate notice was not given on the substantive provisions imposed on implementation of service in the top 100 markets. Also, the mandatory hearing requirement seems extremely arbitrary and excessively burdensome on a CATV applicant. A serious question exists as to what kind of possible showing a CATV applicant could make to prevail against the fears expressed by the majority in the Second Report and Order.

[17]

A basic fallacy of the CATV rules is the rationale which the Commission used to justify its assertion of jurisdiction in order to effectuate their promulgation. The rationale is on a basis so broad as to appear to encompass any kind of interstate communication and thus go beyond delegable powers of Congress. Congress can, of course, delegate certain of its powers to the Commission, but inherent in such delegation is specification of adequate guidelines. The CATV rule making without Congressional delegation of power but under jurisdiction asserted by the Commission was, I believe, so lacking in requisite guidelines as to make it unconstitutional.

[36]

AFFIDAVIT

Glenside, Pennsylvania
June 27, 1966

I, Fred Leiberman, being first duly sworn do hereby depose and state that I am President of TeleSystems Corporation, the respondent in Docket No. 16666, a Show Cause Proceeding before the Federal Communications Commission, and that the following facts are true to the best of my personal knowledge and belief:

1. TeleSystems Corporation (TeleSystems), 113 South Easton Road, Glenside, Pennsylvania, is a multiple owner of CATV systems located in various communities throughout the country. TeleSystems also engages in the construction and management of non-owned CATV systems.

2. In early 1964, TeleSystems made application to Springfield Township, Montgomery County, Pennsylvania, and several other nearby communities for permission to construct and operate CATV systems. On October 14, 1964, the Board of Commissioners of Springfield Township unanimously adopted a resolution looking towards granting TeleSystems permission to construct and operate a CATV system in that community. Further authority for the Springfield Township CATV operation by TeleSystems was contained in an ordinance passed by the Board of Commissioners on May 12, 1965.

3. TeleSystems was granted similar authority from the following communities on the dates shown: Conshohocken, Pennsylvania (February 24, 1965); East Norriton, Pennsylvania (January 7, 1965); North Wales, Pennsylvania (October 12, 1965); and Horsham, Pennsylvania (December 7, 1965).

[37]

4. The populations (Est. 1964) of the aforementioned communities are as follows:

(a) Springfield Township	28,000
(b) Horsham Township	10,000
(c) North Wales	4,000
(d) Conshohocken	12,000
(e) East Norriton Township	8,000
Total:	62,000

5. Prior to February 15, 1966, TeleSystems had installed antennas, constructed a head-end building, installed head-end equipment and placed cables in Springfield Township, and although its system was not then rendering a commercial CATV service, it was operational, and was receiving television signals from stations in New York City and Philadelphia.

6. In addition to the substantial cost of the construction of its system in Springfield Township, TeleSystems has incurred costs in excess of $150,000 in prosecuting the subject franchises for CATV operations. In order to comply with commitments connected with those franchises, TeleSystems has leased space on an existing tower in Springfield Township at a total ten-year cost of $116,000. TeleSystems also has negotiated and/or executed contracts with telephone and power companies. These contracts have fixed liabilities, and the pole lease agreements with the telephone company will become void if TeleSystems fails to proceed with timely construction.

[38]

7. The CATV franchises granted to TeleSystems contain forfeiture clauses, to become operative in the event system construction does not proceed within certain speci-

fied periods of time. Failure to comply fully with terms and conditions of the franchises can result in the loss of all franchise rights and privileges. The franchises also contain provisions for the payment to the communities of specified license fees whether or not the system is producing any income. Thus, TeleSystems is obligated to pay the following sums under the ordinances:

(a) Springfield Township	$1,000, due 9/30/66
(b) Conshohocken	$1,000, due 9/30/66
(c) East Norriton	$750, due 9/30/66
(d) North Wales	$150, due 9/30/67
(e) Horsham	$500, due 9/30/67

8. Affiant believes that the viability of the proposed CATV operations is founded upon the ability to join reception of local television stations with the additional independent television services from New York City.

TELESYSTEMS CORPORATION

/s/ Fred Leiberman
FRED LEIBERMAN

Subscribed and sworn to before me
this 27th day of June, 1966.

/s/ Miriam Maitel
Notary Public, Cheltenham Twp., Montg. Co.

My Commission Expires April 15, 1968

[39]

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

Docket No. 16666

IN THE MATTER OF

Cease and Desist Order to be directed against TELE-SYSTEMS CORPORATION, owner and operator of a community antenna television system at Springfield Township, Pennsylvania

STIPULATION

It is stipulated by and between the parties to this proceeding as follows:

Respondent, TeleSystems Corporation (TeleSystems) is the owner and operator of a community antenna television system located wholly within Springfield Township, Montgomery County, Pennsylvania.

That the aforesaid facility is a community antenna television system as defined by Section 74.1101 of the Rules since TeleSystems proposes to serve more than 50 subscribers and will not be limited, in its service, to the residents of one or more apartment dwellings under common ownership, control, or management and commercial establishments located on the premises of such an apartment house.

That TeleSystems commenced service to its CATV subscribers on May 18, 1966 and that such service has continued up to and including the present date.

That TeleSystems delivers to its subscribers the signals of television stations WNEW-TV (Channel 5), WOR-TV (Channel 9), and WPIX (Channel 11), New York City, New York; KYW-TV (Channel 3), WFIL-TV (Channel 6), WCAT-TV (Channel 10), WIBV-TV (Channel 29), WPHL-TV (Channel 17)* and WUHY-TV (Channel 35), Philadelphia, Pennsylvania; WHYY-TV (Channel 12), Wilmington, Delaware; and WKBS (Channel 48), Burlington, New Jersey.

That Springfield Township, Pennsylvania is located beyond the predicted Grade B contours of television stations WNEW-TV, WOR-TV and WPIX, New York City, New York.

That Springfield Township is located within the predicted Grade A contours of the following television stations authorized in Philadelphia, Pennsylvania:

KYW-TV (Channel 3), WFIL-TV (Channel 6), WCAU-TV (Channel 10), WUHY-TV (Channel 35), WGTI(CP) (Channel 23), WPHL-TV(CP) (Channel 17), WIBV-TV (Channel 29) and WKBS (Channel 48).

That Philadelphia is ranked by the American Research Bureau as the 4th largest television market based on net weekly circulation figures for 1965.

That TeleSystems has not sought an evidentiary hearing pursuant to Section 74.1107 of the Rules.

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*WPHL-TV was inadventenly omitted from the Broadcast Bureau's Exhibit No. 1; however all counsel to this proceeding have agreed to the correction of the record to show that WPHL-TV is carried on respondent's CATV system.

That TeleSystems has not given notification to television stations pursuant to Section 74.1105 of the Rules.

Respectfully submitted,

By .....
J. E. RICKS
Counsel for TeleSystems Corporation

By .....
BENEDICT P. COTTONE
Counsel for Philadelphia Television
Broadcasting Company

By .....
ROBERT W. COLL
Counsel for Westinghouse
Broadcasting Co., Inc.

By /s/ Joseph Chachkin
JOSEPH CHACHKIN
Counsel for Broadcast Bureau

June 22, 1966

[42]

AFFIDAVIT

CITY OF WASHINGTON)
) SS
DISTRICT OF COLUMBIA)

Irving R. McConnell, being duly sworn, deposes and says:

1. He is an Electronics Engineer employed by the Federal Communications Commission in the Hearing Division of the Broadcast Bureau and that his qualifications and experience are known to the Commission.

2. He has prepared the attached map Figure 1 showing the location of the predicted Grade B contours of television broadcast stations WPIX, WOR-TV, and WNEW-TV all operating with antennas atop the Empire State Building, New York City (N 40°-44′-54″; W 73°-59′-10″) and of WHYY-TV Wilmington, Delaware which has its antenna site (N 39°-41′-21″; W 75°-05′-22″) in New Jersey. The Grade B contours (56 dbu) of WPIX (CH. 11) and WOR-TV (CH. 9) fall at distances of 65 miles and 63 miles, respectively, and the Grade B contour (47 dbu) of WNEW-TV (CH. 5) falls at a distance of 68 miles from their New York site and do not reach Springfield Township in Montgomery County, Pennsylvania. The depiction of Springfield Township on Figure 1 was derived from the 1960 U.S. Census map of the Philadelphia, Urbanized Area, copy of which is attached as Figure 2. Springfield Township is no more than 30 miles from WHYY-TV (CH. 12) and well within the Grade B contour (56 dbu) of WHYY-TV which falls at a distance of 62 miles from its site as shown on Figure 1. The foregoing four predicted Grade B contours were located in accordance with Section 73.684 of the Commission's Rules.

[43]

The effective radiated powers and antenna heights above average terrain in the direction of Springfield Township used in the calculations were: for WOR-TV, 21.9 dbk and 1,280 feet; for WPIX, 20 dbk and 1,450 feet; for WNEW-TV, 15.7 dbk and 1,370 feet; for WHYY-TV, 25 dbk and 930 feet.

3. He has prepared the attached map Figure 3 depicting the locations of the antenna sites of the 7 Philadelphia television broadcast stations with respect to the boundary of Springfield Township. Station WPHL-TV is located within Springfield Township. Station WIBF-TV's site is about 3 miles east of Springfield. Station WGTI (CP) and WUHY (Ed.) are about 9.5 miles south of Springfield. Four stations including WKBS Burlington as well as KYW-TV, WFIL-TV and WCAU-TV are clustered together at a location within 1.5 miles of Springfield. No part of Springfield is more than 13 miles from any of the sites of the Philadelphia stations and all of the Grade A contours have a radial extent in excess of 25 miles. As the result of the proximity of the sites to Springfield, the entire township is within the Grade A contours of all the Philadelphia stations. The preparation of Figure 3 reflects on the same scale the boundaries of Springfield and Philadelphia as shown on Figure 2 and relied upon the following coordinates for the sites:

KYW-TV (CH. 3) N 40°-02′-38.5″; W 75°-14′-25.5″

WFIL-TV (CH. N 40°-02′-38.5″; W 75°-14′-25.5″

WCAU-TV (CH. 10) N 40°-02′-36″; W 75°-14′-12″

[44]

WUHY-TV (CH. 35) N 39°-57′-04″; W 75°-10′-08″

WGTI (CP) (CH. 23) N 39°-57′-02″; W 75°-09′-21″

WPHL-TV (CP) (CH. 17) N 40°-05′-00″; W 75°-10′-47″

WIBF-TV (CH. 29) N 40°-05′-16″; W 75°-07′-43″
WKBS (CH. 48) N 40°-02′-35.5″; W 75°-14′-32.5″

/s/ Irving R. McConnell
IRVING R. MCCONNELL

Subscribed and sworn to before me
this 21st day of June, 1966.

/s/ Ben F. Waple
Notary Public, Dist. of Columbia

My Commission Expires 6-14-70

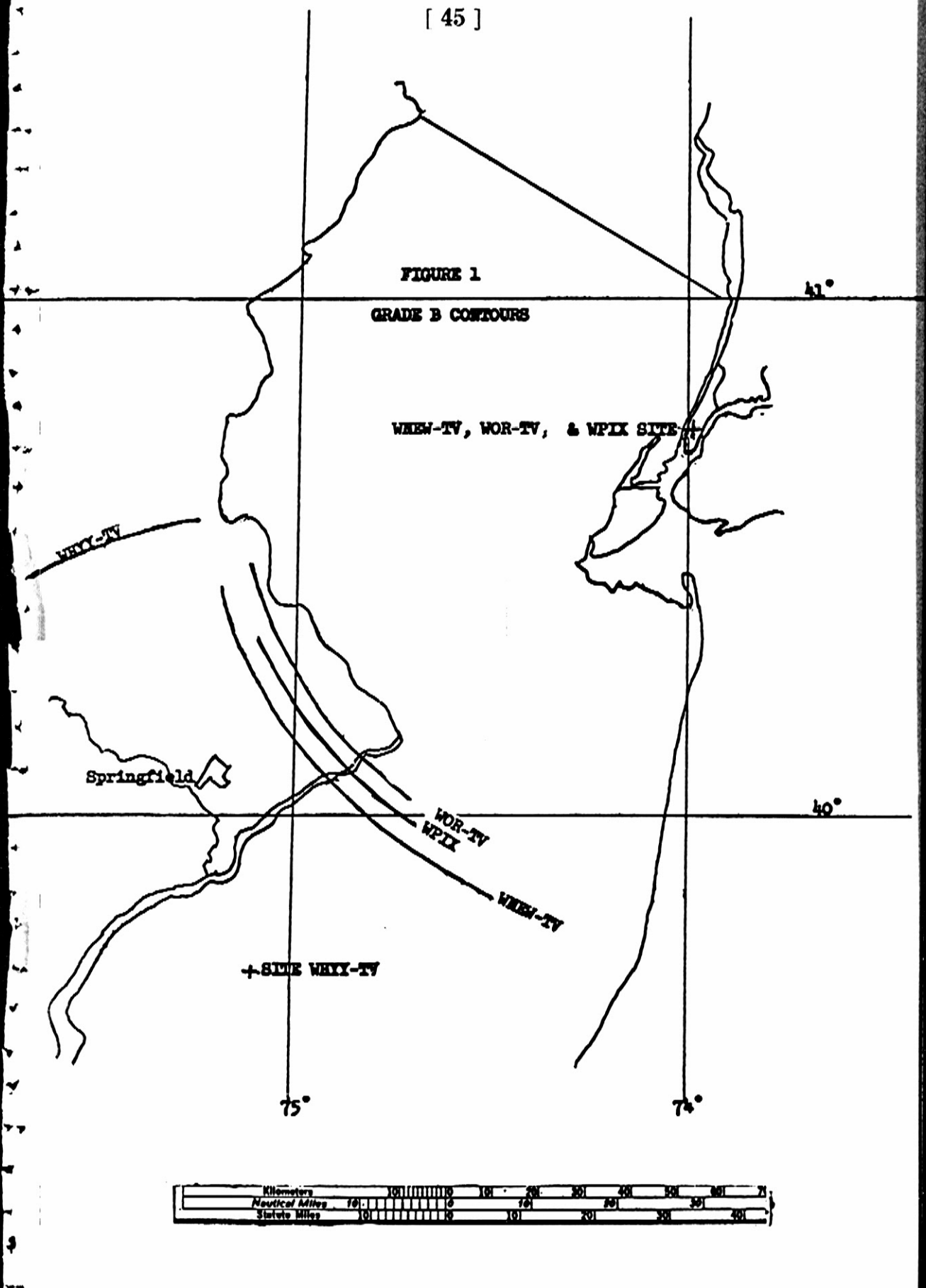
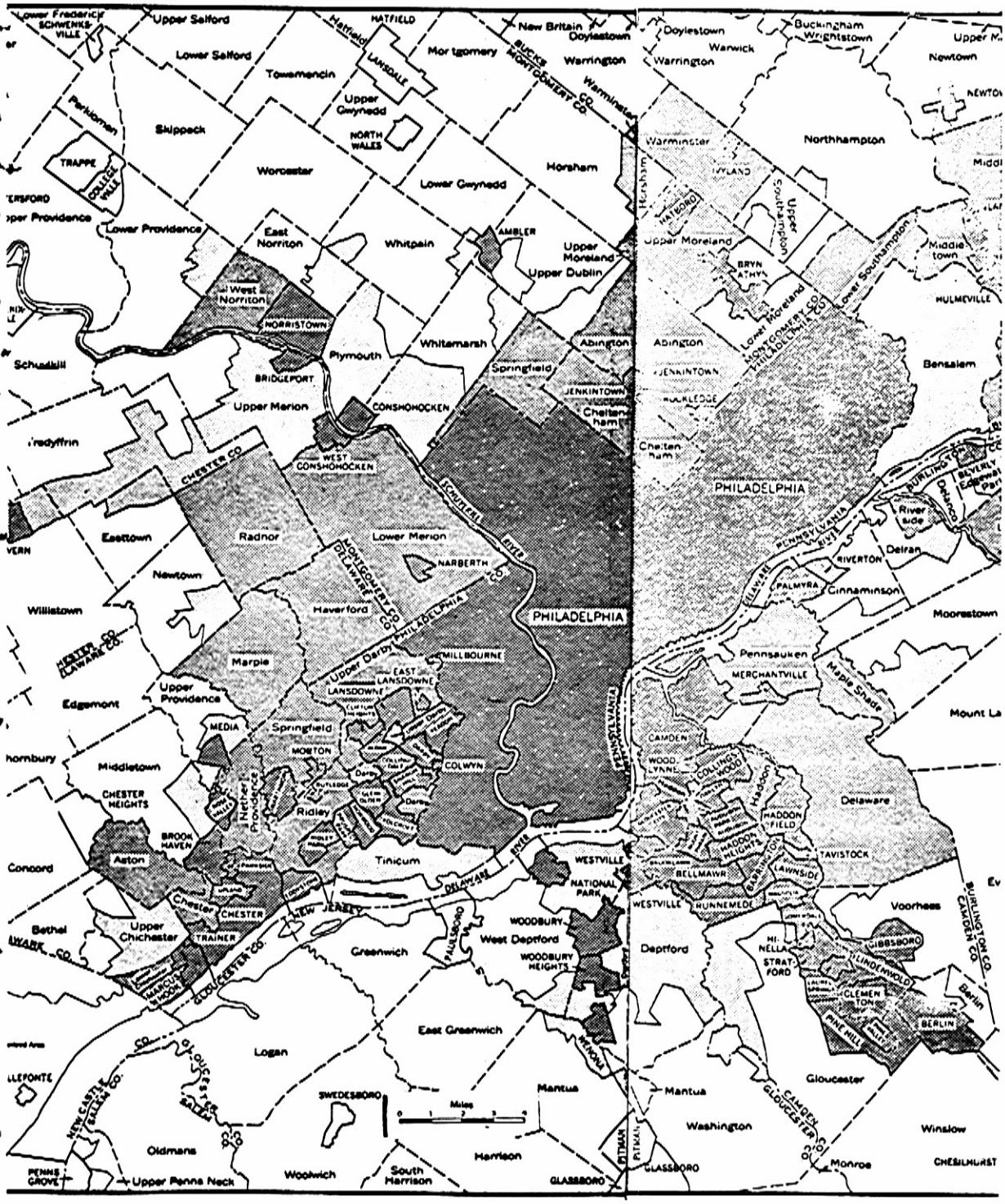


FIGURE 1
GRADE B CONTOURS
WNEW-TV, WOR-TV, & WPIX SITE
WHYY-TV
Springfield
WOR-TV
WPIX
WNEW-TV
+SITE WHYY-TV
41°
40°
75°
74°
Kilometers
Nautical Miles
Statute Miles

Pennsylvania

PHILADELPHIA URBANIZED AREA **FIGURE 2**



Springfield
Schuylkill River
WPHL-TV SITE
WIBF-TV SITE
ANTENNA FARM SITE
KYW-TV
WFIL-TV
WCAU-TV
WKBS
PHILADELPHIA
WUHY-TV SITE
WGTI SITE
Miles
0 1 2 3 4

FIGURE 3

[113]

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

Docket No. 16666

IN THE MATTER OF

Cease and Desist Order to be directed against TELE-SYSTEMS CORPORATION, owner and operator of a community antenna television system at Springfield Township, Pennsylvania

SUPPLEMENTAL STIPULATION

It is stipulated by and between the parties to this proceeding as follows:

As of July 19, 1966, TeleSystems Corporation has received orders for CATV service from 60 subcribers in Springfield Township. Over 50 of such subscribers have paid the $5.00 monthly charge for service, and TeleSystems Corporation considers itself legally bound to render the requested service.

Respectfully submitted,

By .....
J. E. RICKS
Counsel for TeleSystems Corporation

By .....
BENEDICT P. COTTONE
Counsel for Philadelphia Television Broadcasting Company

By .....
ROBERT W. COLL
Counsel for Westinghouse Broadcasting Co., Inc.

By .....
THOMAS B. FITZPATRICK
Counsel for the Broadcast Bureau

[114]

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

Docket No. 16666

IN THE MATTER OF

Cease and Desist Order to be directed against TELE-SYSTEMS CORPORATION, owner and operator of a community antenna television system at Springfield Township, Pennsylvania

APPEARANCES

Jay E. Ricks (Hogan & Hartson) on behalf of TeleSystems Corporation; *Benedict P. Cottone* and *Joseph A. Fanelli* (Cottone & Fanelli) on behalf of Philadelphia Television Broadcasting Company; *Robert W. Coll* (McKenna & Wilkinson) on behalf of Westinghouse Broadcasting Company, Inc.; and *Joseph Chachkin* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

Commissioner Cox for the Commission: Commissioners Bartley and Loevinger dissenting and issuing statements; Commissioner Johnson not participating.

1. This proceeding was initiated by an Order to Show Cause, FCC 66-477, 3 F.C.C. 2d 830, released May 27, 1966, directing TeleSystems Corporation (hereinafter TeleSystems) to show cause why it should not be ordered to cease and desist from further operation of a community antenna system (hereinafter CATV) in Springfield Township, Pennsylvania, in violation of Sections 74.1105

and 74.1107 of our Rules. Since expeditious resolution of this matter was deemed essential, we further ordered that, immediately after closing, the record be certified to the Commission for final decision and that the parties file their proposed findings of fact and conclusions of law within seven days after the date the record is closed.

2. A prehearing conference was held before Hearing Examiner David I. Kraushaar on June 15, 1966, and an informal conference of counsel for all parties was held at the Examiner's office on June 17, 1966. At the former conference, the Examiner granted the motions for leave to intervene filed by Philadelphia Television Broadcasting

Company, licensee of Station WPHL on Channel 17 at Philadelphia, Pennsylvania (WPHL), and by Westinghouse Broadcasting Company, Inc., licensee of Station KYW-TV on Channel 3 at Philadelphia, Pennsylvania (KYW-TV). The Examiner formalized that ruling by an Order, FCC 66M-846, released June 15, 1966.

3. The evidentiary hearing was held and the record was closed on July 1, 1966. As directed by the Order to Show Cause, the Examiner corrected the transcript of the hearing in certain respects and certified the record to us by an Order, FCC 66M-930, released July 5, 1966. Proposed findings of fact and conclusions of law were filed by TeleSystems, WPHL, KYW-TV, and the Broadcast Bureau on July 8, 1966. In addition, on the same date, a brief in support of its proposed findings and conclusions was filed by TeleSystems.

4. Rules governing the regulation of all CATV systems were adopted by our Second Report and Order in Docket Nos. 14895, 15233 and 15971, 2 F.C.C. 2d 725, released March 8, 1966; and these rules were published in the Federal Register on March 17, 1966 (31 F.R. 4540). A

CATV system is defined by Section 74.1101(a) of the Rules as:

> "[A]ny facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house."

Each of the parties in this proceeding has stipulated that the facility operated by TeleSystems in Springfield Township, Pennsylvania, is a community antenna television system as defined by Section 74.1101 of the Rules.

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5. Sections 74.1105 and 74.1107, which are the bases for the charges in the Order to Show Cause issued in this proceeding, were made effective immediately upon publication. Section 74.1105 provides, in part, that effective March 17, 1966, no CATV system shall commence operation, or begin supplying to its subscribers the signal of any television station carried beyond the Grade B contour of that station, unless the CATV system has given prior notice of the proposed new service to the licensee or permittee of any television station within whose predicted Grade B contour the CATV system operates or will operate. The portions of Section 74.1107 pertinent to this proceeding provide as follows:

> "(a) No CATV system operating within the predicted grade A contour of a television broadcast sta-

tion in the 100 largest television markets shall extend the signal of a television broadcast station beyond the grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

"(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within 30 days after such public notice. A reply to such responses or statement may be filed within a 20-day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

* * * *

"(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; . . . ."

6. The basic facts in this proceeding are not in dispute, having been stipulated by the parties. TeleSystems is the owner and operator of a CATV system located wholly within Springfield Township, Montgomery County, Pennsylvania. TeleSystems commenced service to its CATV subscribers on May 18, 1966, carrying the signals of the following eleven television stations:

WNEW-TV (Channel 5)	New York, New York
WOR-TV (Channel 9)	New York, New York
WPIX (Channel 11)	New York, New York
KYW-TV (Channel 3)	Philadelphia, Pennsylvania
WFIL-TV (Channel 6)	Philadelphia, Pennsylvania
WCAU-TV (Channel 10)	Philadelphia, Pennsylvania
WPHL-TV (Channel 17)	Philadelphia, Pennsylvania
WIBF-TV (Channel 29)	Philadelphia, Pennsylvania
WUHY-TV (Channel 35)	Philadelphia, Pennsylvania
WHYY-TV (Channel 12)	Wilmington, Delaware
WKBS (Channel 48)	Burlington, New Jersey

7. Springfield Township is within the predicted Grade A contour of each of the six Philadelphia, Pennsylvania, television stations listed above. Philadelphia is ranked by the American Research Bureau as the fourth largest television market based on net weekly circulation figures for 1965. TeleSystems' CATV system therefore comes within the provisions of Section 74.1107 as one operating within the predicted Grade A contour of a television station in

the top 100 markets and as one which may not extend the signal of a television station beyond that station's Grade B contour without our approval. Since Springfield Township is located within the predicted Grade B contour of each of the Wilmington, Burlington, and Philadelphia television stations, no violation of that rule results from the distribution of any of those television signals on the CATV system, and carriage of those television stations by the CATV system is permissible. See *Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 798 (1966), *Mission Cable TV, Inc., and Trans-Video Corp.*, FCC 66-548, released June 22, 1966, and *Booth American Company*, FCC 66-625, released July 18, 1966.

8. On the other hand, no part of Springfield Township is located within the predicted Grade B contours of New York television stations WNEW-TV, WOR-TV and

WPIX. Notwithstanding its commencement of service on May 18, 1966, and the carriage of the New York stations since that date, TeleSystems has not given the notification required by Section 74.1105 of the Rules to the Wilmington, Burlington, and Philadelphia television stations. In addition, TeleSystems has not requested permission to extend the signals of these New York television stations pursuant to Section 74.1107 of the Rules; nor have we granted such permission. Since TeleSystems' CATV service was instituted after February 15, 1966, it was required to obtain such permission under Section 74.1107. Thus, the record establishes that the signals of three New York television stations are being extended beyond their Grade B contours in violation of the provisions of Section 74.1107. Therefore, the only issue presented in this proceeding is whether the foregoing facts require the issuance of an Order directing TeleSystems to cease and desist from further operation of its CATV system in violation of our Rules.

9. TeleSystems asserts that we have no jurisdiction over non-microwave CATV systems located wholly within a single state, that we have no jurisdiction to limit or control the reception of available off-the-air television signals, that our Rules which limit the right of a CATV system to distribute certain off-the-air television signals are in violation of the First Amendment to the United States Constitution, and that our rule restricting the operation of CATV systems in the top 100 television markets was adopted on an inadequate record and is unreasonable and discriminatory. With respect to our jurisdiction, and the validity of our Rules, our position was set forth in the Second Report and Order, 2 F.C.C. 2d 725, at 729-734, and 793-797. We adhere to the views therein expressed; thus there is no necessity to repeat them here.

10. During the course of this hearing TeleSystems sought to adduce evidence concerning its expenditures and commitments in connection with the construction and operation of its Springfield Township CATV system and concerning forfeiture clauses which will take effect if construction of the CATV system does not proceed within specified periods of time. TeleSystems urges that this evidence is relevant and must be considered in determining whether the cease and desist order should be issued, citing *C. J. Community Services, Inc.* v. *Federal Communications Commission*, 100 U.S. App. D.C. 379, 246 F. 2d 660 (1957). This question was fully considered in *Booth American Company, supra*, pars. 14-17, where we held that this type of proceeding would as a general rule be limited to determining whether there was a violation of our rules, with other matters (such as hardship) going to possible waiver of our rules being considered in separate proceedings following the filing of an appropriate petition for waiver (and compliance, in the meantime, with our Rules) or hearing. For the reasons stated therein, we conclude that the Hearing Examiner properly

excluded the proffered evidence. See also *Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 798, at 804 and 3 F.C.C. 2d 808, at 810-811, where we rejected respondent's request to consolidate the show cause proceeding with the application for permission to carry the distant signals so that evidence similar to that offered by TeleSystems could be introduced and considered by the Commission as a basis for granting a waiver in lieu of issuing a cease and desist order.

11. We believe it important here to emphasize again our reasons for refusing to treat a cease and desist proceeding as including issues appropriate to the adduction of evidence such as that proffered by TeleSystems. First, it is patently bad practice to permit a party knowingly to violate a rule, and to continue to do so while a subsequent request for a waiver or other relief is considered. Such a practice would encourage violation of the rule rather than compliance. In this situation, the results would be more serious than with some other types of rules, since violation involves increasing magnification of the problem—the CATV system grows while the issue remains undecided.

12. Second, allowance of such a practice would be manifestly unfair to other parties who are obeying the rule while they proceed through hearing or await action on waiver requests. Three such requests were granted on June 29, 1966.[1] The orderly processing line created to deal with waiver requests would disintegrate if the course

[1] The request of Martin County Cable Company, Inc., Martin County and Stuart, Florida, was filed March 16, 1966; that of Coldwater Cablevision, Incorporated, Coldwater Michigan, was filed April 26, 1966; and that of Chenor Communications, Inc., Chenango, New York, was filed March 29, 1966. See Memorandum Opinions and Orders, FCC 66-568, FCC 66-569, and FCC 66-570, all released July 1, 1966.

chosen by TeleSystems were permitted. We see no equity and no public interest in elevating defiance of any rule to a place of precedence over the presentation of arguments through reasonable processes created for the sole purpose of considering them. For the reasons stated above and in *Booth American Company* and in *Buckeye Cablevision, Inc., supra,* we are persuaded that, where a violation of Section 74.1107(a) of the Rules has been established, no consideration should be given to the withholding of a cease and desist order because of claimed facts peculiar to the case under consideration but relevant only to the possible waiver of the rule.

13. In summary, the record in this proceeding establishes: (a) that TeleSystems owns and operates a CATV system, as defined by Section 74.1101(a) of the Rules, in Springfield Township, Pennsylvania; (b) that TeleSystems' CATV system operates within the Grade A contours of television stations in the Philadelphia, Pennsylvania, market, which is the fourth largest television market; (a) that TeleSystems' CATV system began operation after February 15, 1966; (d) that since May 18, 1966, TeleSystems' CATV system has been extending the sig-

nals of three New York City television stations beyond their Grade B contours without requesting and obtaining the necessary approval; and (b) that TeleSystems has not given notice of the commencement of its CATV service to the licensees and permittees of television stations within whose predicted Grade B contours the CATV system is operating.[2] We therefore conclude that TeleSys-

[2] The notification violation, insofar as carriage of local signals is involved, might well be of little significance in the circumstances of this proceeding and, on a proper request and showing, could be subject of waiver. No request, however, has been made in this respect; on the contrary, TeleSystems challenges this aspect of our regulations, also.

tems is operating its CATV system in Springfield Township, Pennsylvania, in violation of Sections 74.1105 and 74.1107 of the Rules and Section 312(b) of the Communications Act.[3] We also conclude, for the reasons stated herein and in *Buckeye Cablevision, Inc., supra, Mission Cable TV, Inc., and Trans-Video Corp., supra,* and *Booth American Company, supra,* that the public interest requires the issuance of an Order requiring TeleSystems to cease and desist from the unlawful operation of its CATV system.

14. We shall provide the same timetable for compliance with this Decision as was used in *Buckeye Cablevision,* 3 F.C.C. 2d at 805-806. TeleSystems must comply with this cease and desist Order within two days, excluding Saturdays, Sundays, and holidays, if any, after its release, unless it notifies the Commission during that period of its intention to seek judicial review of this Order; in that event, Telesystems will be afforded an additional 14-day period within which to file its appeal and seek a stay of this Order.

15. ACCORDINGLY, IT IS ORDERED, This 27th day of July, 1966:

(1) that, within two days after the release of this Decision, TeleSystems Corporation CEASE AND DESIST from the operation of its community antenna television system at Springfield Township, Penn-

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[3] Section 502 of the Communications Act provides as follows:

"Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

sylvania, until 30 days after notice is given to the licensees and permittees of all television broadcast stations within whose predicted Grade B contours TeleSystems' CATV operates as required by Section 74.1105 of the Commission's Rules; and

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(2) that, within two days after the release of this Decision, TeleSystems Corporation CEASE AND DESIST from the operation of its community antenna television system at Springfield Township, Pennsylvania, in such a way as to extend the signals of any television broadcast station beyond its Grade B contour in violation of Section 74.1107 of the Commission's Rules, and specifically to cease and desist from supplying to its subscribers the signals of Stations WNEW-TV, WOR-TV, and WPIX, New York, New York;

Provided, that, if TeleSystems Corporation notifies the Commission within two days of the release of this Order that it intends to seek judicial review and seeks judicial review and a judicial stay within 14 days of the date of the release of this Order, this Order shall not be effective until judicial determination of the motion for a stay.

FEDERAL COMMUNICATIONS COMMISSION *

BEN F. WAPLE
Secretary

Released: July 28, 1966

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* See attached Dissenting Statement of Commissioner Bartley

* See attached Dissenting Statement of Commissioner Loevinger

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I concurred in the issuance of the Show Cause Order herein to the extent that it provided a means of obtaining judicial decision on the merits of the case at the earliest possible date as desired by the respondent.

I dissent to the issuance of this Cease and Desist Order against TeleSystems Corporation. In the absence of congressional action, I agree with the respondent's contention that the Commission does not have jurisdiction over CATV systems and that, consequently, the rules adopted in the second report and order are invalid. Even assuming, arguendo, that the Commission does have jurisdiction, I believe that section 74.1107 of the rules is invalid because it contravenes section 4(c) of the Administrative Procedure Act, which provides that a substantive rule not be made effective in less than 30 days after required publication except as otherwise provided by the agency upon good cause found and published with the rule.

Section 74.1107 was made effective immediately upon the required publication. A recitation of good cause found was made on the basis of injury to the public from continued implementation of service extending grade B signals.

In my opinion, injury to the public was not supported with any factual indication or showing and was purely unfounded speculation. There appeared to be more indication of benefit, rather than injury, to the public from the extended service in question. Consequently, the recitation of good cause found was, I believe, a nullity under section 4(c) of the Administrative Procedure Act, and the immediate effective date of the rule rendered it invalid.

The February 15 cutoff date of section 74.1107(d) appears in practical operation to be a retroactively applied effective date of the rule itself and, accordingly, a further ground for invalidity of the rule.

Moreover, I believe that section 74.1107 is not valid because adequate notice was not given on the substantive provisions imposed on implementation of service in the top 100 markets. Also, the mandatory hearing requirement seems extremely arbitrary and excessively burdensome on a CATV applicant. A serious question exists as to what kind of possible showing a CATV applicant could make to prevail against the fears expressed by the majority in the second report and order.

A basic fallacy of the CATV rules is the rationale which the Commission used to justify its assertion of jurisdiction in order to effectuate their promulgation. The

rationale is on a basis so broad as to appear to encompass any kind of interstate communication, and thus go beyond delegable powers of Congress. Congress can, of course, delegate certain of its powers to the Commission, but inherent in such delegation is specification of adequate guidelines. The CATV rulemaking without congressional delegation of power but under jurisdiction asserted by the Commission was, I believe, so lacking in requisite guidelines as to make it unconstitutional.

Also, I strongly oppose the Commission's policy "of not considering requests for waiver by persons operating in violation of section 74.1107 until the violation has ceased." *Buckeye Cablevision, Inc.*, 3 FCC 2d at 810, paragraph 8. Such policy is tantamount to finding an operator guilty and carrying out punishment before he has been given a trial. Under this policy, the Commission says we think

you are operating in violation of the rules but, before we have a hearing to determine the matter, we'll punish you by not acting on your request for waiver. It may well be that if a waiver request were acted upon timely it would be granted and there would be no need for the Show Cause Order.

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DISSENTING STATEMENT OF COMMISSIONER LOEVINGER

I dissent because I believe that in the circumstances of this case the Commission lacks jurisdiction for the reasons set forth in my separate opinion accompanying the First Report and Order in the CATV proceeding.

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BRIEF FOR INTERVENOR,
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,387

TELESYSTEMS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

PHILADELPHIA TELEVISION BROADCASTING CO.,
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
and WESTINGHOUSE BROADCASTING COMPANY, INC.,
Intervenors.

APPEAL FROM A DECISION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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March 14, 1967

QUESTIONS PRESENTED

Appellant has stated the questions presented as stipulated by the parties.

INDEX

TABLE OF AUTHORITIES

CASES:

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Intervenors.

APPEAL FROM A DECISION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR,
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.

COUNTERSTATEMENT OF THE CASE

Intervenor Association of Maximum Service Telecasters, Inc. ("MST") adopts the counterstatement of the case contained in the brief of appellee.

SUMMARY OF ARGUMENT

1. CATV systems, including appellant's constitute interstate communication by wire or radio, to which the Communications Act applies. The Commission's statutory powers with respect to television provide the basis for regulating CATV to assure that CATV communications operations are consistent with, and do not disrupt, the television allocations plan established by the Commission and supported by Congress. The CATV rules are not an attempt to regulate "reception" of television signals but are instead addressed to the distribution of signals by CATV systems, which are not mere "master antennas." Moreover, the Commission is not attempting to "license" CATV systems; even if it were, its statutory power to regulate would be the same, and none of the procedural requirements of licensing are claimed to have been violated.

2. The distant signal rules are not "retroactive." They apply "grandfather" rights as of the first date on which the Commission announced the substance of its new rules, and hence frantic efforts to get into operation before the rules were formally published in the Federal Register would not "grandfather" a CATV system operating in violation of the rules. This is common and entirely appropriate when an industry is first regulated. This being so, making the rules effective on the date of publication, rather than 30 days later, was justified.

3. The CATV distant signal rules and policies do not violate the First Amendment. They merely prevent CATV systems, which are business entities within the Commission's power to regulate, from accomplishing what television broadcasters are not permitted to accomplish — the transportation of television signals across the country without regard either to the rights of program owners or to the impact on smaller television stations. The distant signal rules and policies do not regulate program content. They merely provide the basis for determining where and

under what circumstances television signals may be carried beyond their normal service areas. They promote, rather than hinder, true freedom of speech.

ARGUMENT

I.

Appellant's CATV System Is Engaged in Interstate Communication by Wire or Radio and Is Subject to the Communications Act and to FCC Regulatory Authority.

A. *CATV Constitutes "Interstate Communication by Wire or Radio" to Which the Act Applies.*

Section 2(a) of the Communications Act, 47 U.S.C. § 152 (a), provides that the Act shall apply "to all interstate and foreign communication by wire or radio" and to all persons engaged in such communication. Sections 3(a) and (b), 47 U.S.C. § 153(a), (b), define wire and radio communication as the transmission of writing, signs, signals, pictures and sounds by means of wire and/or radio, including "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

CATV receives, forwards and delivers communications and is incidental to wire and radio transmission. See *Clarksburg Publishing Co. v. FCC*, 96 U.S. App. D.C. 211, 217, 225 F.2d 511, 517 (1955). Moreover, CATV systems are part of the stream of continuous interstate communications by radio and television. Appellant's proposed CATV systems, located in Pennsylvania, would carry signals of television stations located in New York, New Jersey, and Delaware. As appellant seems to concede, these systems are thus within FCC jurisdiction even though physically located within a single state. But even if all signals carried were those of stations in the same state as the system, many of the specific programs emanate from

cut of state and would be delivered to appellant's subscribers by a continuous chain of interstate communication. See *Ward v. Northern Ohio Telephone Co.*, 300 F.2d 816 (6th Cir.), *cert. denied*, 371 U.S. 820 (1962); *Pacific Telatronics, Inc.*, 4 R.R.2d 145, 149 (1964); see also *Idaho Microwave, Inc. v. FCC*, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965); *United States v. American Tel. & Tel. Co.*, 57 F. Supp. 451, 454 (S.D. N.Y. 1944), *aff'd per curiam sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945).

Under the circumstances it is not surprising that the National Community Television Association (NCTA), the trade association of the CATV operators and manufacturers, has not only conceded but argued that CATV is in interstate commerce.[1] Since CATV clearly is communica-

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[1] "A community antenna television system is directly concerned *with television broadcasting, an area of governmental control of which there has been complete occupation by the Federal Government* ...." Brief of NCTA before Conn. Public Utilities Commission, Docket No. 10250, p. 3 (1964). (Emphasis supplied.)

* * *

"Briefs are being filed with the Nevada PSC, calling the attention of that Commission to the fact that CATV systems are *unquestionably engaged in interstate commerce* ...." *Id.*, p. 9. (Emphasis supplied.)

* * *

"That community antennas are in interstate commerce for the purpose of inclusion in the broad field of radio and television may reasonably be argued .... [T]he Federal Communications Commission has actually exercised jurisdiction to promulgate rules and regulations affecting community antenna systems." *Id.*, Ex. B, p. 20.

This argument was made in the context of a broad claim that federal authority over CATV preempts the field and hence precludes state regulation of CATV. The context does not diminish the applicability of the concession that CATV is interstate commerce where CATV is seeking to avoid federal regulation as well.

tion by wire or radio, this concession means CATV is clearly interstate communication by wire or radio. It is therefore subject to the Communications Act.

B. *The Commission Has Power To Regulate CATV Systems.*

Section 1 of the Communications Act, 47 U.S.C. § 151, directs the FCC to "make available to *all* of the people of the United States a rapid, efficient, Nationwide wire and radio communication service." (Emphasis added.) There are two especially relevant statutory corollaries of this mandate. Section 307(b) of the Act, 47 U.S.C. § 307(b), requires that "the Commission shall make such distribution of licenses, frequencies, hours of operation and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Section 303(h), 47 U.S.C. § 303(h), authorizes the FCC "to establish areas or zones to be served by any station."

In accordance with these provisions, the FCC in 1952 established limitations on the power and tower height, and hence the service areas, of television stations. At the same time, as this Court well knows, the Commission adopted a table of television assignments allocating specific channels to specific communities to provide television service oriented to meet the individual needs and interests of the community and area served. This nationwide plan of local and area television broadcast service was upheld by this Court, *Logansport Broadcasting Corp. v. United States*, 93 U.S. App. D.C. 342, 210 F.2d 24 (1954); *Peoples Broadcasting Co. v. United States*, 93 U.S. App. D.C. 78, 209 F.2d 286 (1953).

This approach also received the express approval of Congress. The original table contemplated use of both UHF and VHF channels. By 1962, there were 500 VHF stations on the air (of a total of 681 channels allocated) but only 103 UHF (out of 1,544 channels allocated). Thus,

93 per cent of the available UHF channels were idle. With little public demand for "all-channel" sets, only 16 per cent of television receivers in American homes in 1962 could receive UHF, and only 6 per cent of sets produced in 1961 could do so. H.R. Rep. No. 1559, 87th Cong., 2d Sess. 2 (1962). The House Commerce Committee said:

> "If the American people are to have the chance to enjoy the benefits of television service to the fullest degree, then a major portion of the UHF channels not now assigned must be put into operation." (*Ibid.*)

Congress thereupon took the extraordinary step of enacting the "all-channel" receiver law, which enabled the Commission to require all television sets shipped in interstate commerce (or imported from abroad) to be capable of receiving all of the UHF and VHF television broadcast frequencies. Act of July 10, 1962, 76 Stat. 150, adding Secs. 303(s) and 330 to the Communications Act. The Commission has implemented the statute by appropriate regulations, 47 C.F.R. § 15.65(a).

The all-channel receiver law is a clear congressional approval of the policy decisions that underlay the adoption of the Table of Allocations. The House Committee Report declared "the goal" to be

> "a commercial television system which will (1) be truly competitive on a national scale by making provision for at least four commercial stations in all large centers of population; (2) provide at least three competitive facilities in all medium-sized communities; and (3) permit all communities of appreciable size to have at least one television station as an outlet for local self-expression." (*Id.* at 3.)

The essential purpose of the CATV rules, policies and procedures adopted by the Commission in the *Second Report and Order*, Dockets No. 15971, *et al.*, 2 F.C.C.2d 725 (1966), is to prevent frustration of this allocations plan. Under Section 303(r) of the Act, 47 U.S.C. § 303(r), the Commission is authorized to "make such rules and regulations and prescribe such restrictions and conditions

not inconsistent with law as may be necessary to carry out the provisions of this Act"; see also Section 4(i), 47 U.S.C. § 154(i). In *National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943), the Supreme Court stated that "in the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers." See also *American Trucking Assn's, Inc. v. United States,* 344 U.S. 298 (1953), which affirmed the power of the ICC, acting under a similar legislative mandate, to regulate practices which would disrupt its scheme of regulation if allowed to continue unregulated.

Underlying the Commission's concern is a basic proposition of broadcasting economics, *viz.*, that a station's revenues — and hence its ability to survive and to offer quality programming — is a direct function of its audience. If CATV subscribers could view not only the local and area stations — in this case the Philadelphia, Burlington, N.J., and Wilmington (educational) stations — but also a number of other stations imported from a different television market, such as in this case, New York, the local and area stations would suffer a sharp reduction in their audiences. In some markets all stations could be driven off the air, to take the most extreme case, and the area would not even have "at least one television station as an outlet for local self-expression," the bare minimum contemplated in the House Report for "all communities of appreciable size." But, even if, in a market as large as Philadelphia, the area VHF stations survived but existing or future UHF stations did not, [2] the area would suffer a reduction of present free

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[2] In the Philadelphia-Burlington area there are three independent commercial UHF stations broadcasting — none on the air as much as two years yet — and at least one additional commercial independent UHF station planned for the near future. Without CATV bringing in outside signals, these stations must already compete for audience with three strong network affiliated VHF stations — one owned by CBS, one owned by Westinghouse, and one owned by Triangle Publications.

off-the-air service or would not enjoy an increase in such service, and the higher prices the people paid for television sets because of the all-channel receiver law would be wasted. Even if all local and area stations were able to operate, the audience fragmentation would almost certainly impair the quality of their programming and hinder future efforts to improve service or programming.[3]

The CATV distant signal rules, policies and procedures enable the Commission to assure that situations raising this possibility can, before it is too late, be examined in a hearing to determine where the public interest lies. CATV clearly presents the grave danger that the free television service provided by present or potential local and area stations will be impaired by CATV carriage of distant signals. The Commission has put itself in a position to act to prevent such frustration of the goals of the national television structure by instrumentalities of interstate communications by wire or radio, just as it had earlier adopted rules and policies that prevent large-market television licensees from frustrating those goals by unlimited operation of satellite[4] and translator stations.[5] To say it lacks the power to act in such circum-

[3] See the discussion in the *Notice of Inquiry* and *Notice of Proposed Rule Making*, Docket No. 15971, 1 F.C.C.2d 453, 470, 471, 472 (1965), and in the *Second Report and Order*, 2 F.C.C.2d at 771-73, 775, where the Commission refers to importation of New York signals into the Philadelphia area as a specific example of the kind of problem which led it to assert its jurisdiction to regulate CATV carriage of distant signals.

[4] The term "satellite" is used here to describe a regularly licensed television station that rebroadcasts virtually 100% of the programs of the mother station.

[5] Under long-standing rules and policies of the Commission, Los Angeles and New York television stations, for example, could not impair the viability of existing local television stations and jeopardize the well-being of future local television stations by extending their signals throughout the country through the use of satellite and translator stations. Yet, this is precisely what is threatened by CATV transmission of distant signals, absent effective FCC regulation.

stances and in the light of the numerous statutory provisions cited above is wholly inconsistent with the Supreme Court's view that "Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio," *National Broadcasting Co. v. United States, supra,* 319 U.S. at 217.

The FCC's power to regulate CATV operations indirectly by means of conditions in the licenses of microwave facilities which serve CATV was affirmed in *Carter Mountain Transmission Corp. v. FCC,* 116 U.S. App. D.C. 93, 321 F.2d 359, *cert. denied,* 375 U.S. 951 (1963). The FCC's authority to regulate is not confined to such indirect means but includes the power to regulate CATV systems directly. Addressing itself specifically to the question of FCC regulatory authority over CATV before the Commission had asserted that authority, this Court had on two occasions intimated that the authority exists. *Clarksburg Publishing Co. v. FCC, supra,* 96 U.S. App. D.C. at 217, 255 F.2d at 517; *Citizens TV Protest Committee v. FCC,* 121 U.S. App. D.C. 50, 56-57, 348 F.2d 56, 62-63 (1965); and see *Philadelphia Television Broadcasting Co. v. FCC,* 123 U.S. App. D.C. 298, 300 and n. 5, 359 F.2d 282, 284 and n. 4 (1966).

C. *The Commission Has Not Attempted To Regulate the "Reception" of Television Signals.*

Appellant argues, however, that the Commission has no statutory authority to regulate the "reception of television signals or their distribution on CATV systems." This is largely the "master antenna" argument. Appellant puts the emphasis on "reception." It belongs on "distribution." The CATV rules do not purport to deal with reception of television signals. Only their distribution, for a fee, is subject to regulation. Therefore, the Commission's general lack of authority over television reception, and its need for express legislation to require

UHF reception capability in television receivers, is not relevant to the question before the Court.

This "master antenna" argument has been effectively laid to rest not only by the Commission, 2 F.C.C.2d at 780, but also by a district court. In *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177, 195 (S.D. N.Y. 1966), a case involving copyright liability of CATV systems, the court said flatly:

> "Defendant's [CATV] systems are not passive antennas. They consist of sophisticated, complex, extremely sensitive, highly expensive equipment, especially constructed and designed to reproduce the electromagnetic waves received from the originating television station and to propagate and transmit the new electromagnetic waves through an elaborate network of coaxial cables. The term 'passive' signifies a device which does not add energy to any of the signals being handled by the system. In that sense, only the antenna and the cable are passive. All of the other equipment, such as the preamplifiers, 'Teletrol' demodulators and modulators, WCON converters, 'Channel Commanders' and line and distribution amplifiers, used by defendant's systems at various times, are active, not passive.
>
> "The intensity of the electromagnetic waves as received at defendant's antenna is insufficient to enable them to travel along the coaxial cable to the subscribers and to produce an acceptable or viewable picture without the reproduction of the signals received on new locally supplied energy at higher intensity by defendant's elaborate electronic equipment." [6]

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[6] The court went on:

> "The dominant, over-all function and design of defendant's systems at all times — regardless of the individual instruments or specific equipment used from time to time — were and are aimed at the objective of propagating electromagnetic energy for the purpose of transmitting TV program material to a large number of subscribers, who are, in effect, their audience. In view of the foregoing characteristics, defendant's systems are, in material re-

Paradoxically, appellant concedes (Brief, pp. 21-22) that the Commission properly takes cognizance of television reception in distributing "licenses, frequencies, hours of operation and . . . power" pursuant to Section 307(b) of the Act, and yet claims that the Commission cannot regulate the transmission of television signals by CATV. Sections 303(h)[7] and 307(b) are, it is true, intended to provide guidelines for the allocation of radio frequencies used for radio transmission of television signals; they also provide guidelines for regulating wire transmission of the very same signals when such transmission could, if not regulated, totally alter the distribution of "licenses, frequencies, hours of operation, and . . . power," contrary to the public interest. The Commission's "expansive powers," *National Broadcasting Co. v. United States, supra,* 319 U.S. at 219, surely permit the adoption of reasonable regulations directed to interstate wire communications systems which pose this threat to the public interest.[8]

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spects, analogous to television stations, translator and repeater stations.

"Defendant's systems are communication systems for the reasons that they were designed and engineered to, and do, convey information from one location to other locations." 255 F. Supp. at 196.

[7] The reference by appellant to the Davis Amendment to the Radio Act of 1927 (Brief, pp. 20-21) purports to explain away Section 303(h) of the Communications Act of 1934. However, the Davis Amendment, as appellant points out, amended Section 9(b) of the Radio Act, which is the predecessor of Section 307(b) of the Communications Act. The predecessor of Section 303(h) of the 1934 Act is Section 4(g) of the 1927 Act, 44 Stat. 1164, and the language adopted by Congress in 1927 remains unchanged to this day.

[8] Appellant can derive no support from the fact that the Commission asked for, and obtained, express legislative authority, in the all-channel receiver law, to deal with another impediment to full use of the television broadcast spectrum. As the Commission stated when it urged passage of that law (in the rest of the sentence quoted with emphasis at page 23 of appellant's brief),

D. *The Commission Is Not Attempting To "License" CATV Systems, But Its Regulatory Authority Would Be No Less If It Were.*

Appellant also argues that certain of the CATV rules constitute "licensing" of CATV systems and for that reason are beyond the Commission's power to adopt.

The point of this argument is not entirely clear. It is doubtful whether the Commission is attempting to "license" CATV systems, but in any event the Commission's power to regulate CATV does not turn on any such labelling exercise. Moreover, the chief consequence of applying the label of "licensing" relates to the procedures to be followed, and no claim is made that the procedures set forth in the CATV rules violate the Administrative Procedure Act.

In the exercise of its jurisdiction to regulate CATV, the Commission has not employed the licensing scheme of regulation contemplated by the Communications Act. Title III of the Act provides for licensing only of "apparatus for the transmission of energy or communications or signals by radio," Sec. 301, 47 U.S.C. § 301. In its memorandum on jurisdiction appended to the *Second Report and Order*, the Commission noted the possibility that CATV systems are engaged not only in communication by wire but also communication by radio. The Commission did not undertake to resolve this question, because it has chosen not to regulate CATV systems as being engaged in communication by radio and hence required to obtain what is referred to as a "license" in Section 301 of the Act. 2

". . . Commission jurisdiction over the performance capabilities of television receivers is necessary to carry out this responsibility."

The CATV rules have nothing to do with "the performance capabilities of television receivers" but rather with interstate wire communications systems which receive, amplify, and retransmit the signals of television stations and which are within the coverage of the Communications Act.

F.C.C.2d at 793-94 & n. 1. The prior approval which CATV systems are required to obtain before bringing distant signals into certain classes of communities is not a "license" within the meaning of Section 301, and the Commission has not claimed that it is.

Generally speaking, a "license" is thought to be a personal permission. Thus, taking the cases cited by appellant, *Schwebel v. Orrick* [9] was a proceeding to revoke the privilege of a particular attorney to practice before the SEC, *John E. Merrifield* [10] involved issuance of a certificate to a particular motor carrier, and *New York Central R.R.* [11] involved issuance of a certificate of convenience and necessity to a particular railroad. Similarly, the FCC grants and denies applications by particular persons to use particular radio frequencies.

Under the CATV rules the Commission is not concerned with the characteristics of the particular CATV operator. It is the effect of the proposed service on television broadcasting in a particular area that is important. Whether the proposed service would be furnished by one CATV operator or another makes no difference. Indeed, a request for "approval" under Section 74.1107(b) is not to be made until after the CATV system has obtained whatever franchise may be necessary under state or local law, and the Commission believes, and has told Congress, that franchising of CATV systems should be left to state and local authority. *Notice of Inquiry* and *Notice of Proposed Rule Making, supra,* 1 F.C.C.2d at 466; see H.R. Rep. No. 1635, 89th Cong., 2d Sess. 18-19 (1966).

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[9] Schwebel v. Orrick, 153 F. Supp. 701 (D.D.C. 1957), *aff'd*, 102 U.S. App. D.C. 210, 251 F.2d 919, *cert. denied*, 356 U.S. 927 (1958).

[10] John E. Merrifield Common Carrier Application, 61 M.C.C. 103 (ICC), 2 Pike & Fischer Ad. L. 2d 873 (1952).

[11] New York Central R.R., 282 I.C.C. 283, 2 Pike & Fischer Ad. L. 2d 288 (1952).

The kind of "approval" contemplated by the CATV rules is not at all like a license the Commission issues to operate a radio or television station. That kind of license is a personal privilege. It is issued only after a determination of the eligibility of the particular applicant — apart from the service he proposed to offer — and the license is not transferable without the approval of the Commission. Where a CATV system, however, has received "approval" to carry certain distant signals in a community or area, that approval remains in force no matter who is operating the CATV system. [12] Thus, the

[12] Appellant claims that it is "important to note" that one of the "prior approval" aspects of the CATV rules applies equally to "local and distant signals." It is not at all clear why this is "important," but in any event appellant's description of the rules is too summary to be accurate.

Under Section 74.1105 a proposed CATV system must give the Commission and various broadcasters notice of the proposed operation. The obvious reason is to assure that no CATV system that would be detrimental to the public interest can begin operations without the Commission and interested parties having an opportunity to raise an objection; where an objection is timely raised, the service objected to may not be commenced until the Commission either disposes of the objection or rules on the question of interim relief while an inquiry into the merits of the objection goes forward.

Such objection could be to proposed carriage of "distant" signals into the area served by the objecting station. A station may also object to a proposed new CATV system because the system does not plan to carry the objecting station even though required to do so by the Commission's rules. On the other hand, there may be situations in which a television station might object to a CATV system in the same community carrying the station's signal because of fears that the signal will be seriously degraded and perhaps rendered unwatchable by subscribers to the CATV system. See *First Report and Order*, 38 F.C.C. 683, 731-33 (1965); *e.g.*, Midwest Television, Inc., 4 F.C.C.2d 612, 621, 625 (1966).

As for the purported authority to forbid carriage of signals of "Grade A quality" — apart from the degradation problem — the authorities cited by appellant (Brief, p. 25 n. 36) do not support appellant's assertion. What those authorities refer to is

system of regulation contemplated by the CATV distant signal rules is much more akin to the type of regulation represented by the table of television assignments, and indeed the Commission conceives of its distant signal rules as complementary to that table. In other words, just as, in amending the table, the Commission allocates particular channels to particular communities and areas, the operation of the CATV distant signal rules would have the effect of allocating to a particular community or area one or more distant television stations, not theretofore serving the community or area, by allowing them to be carried on CATV systems. In the case of true channel allocations, the licensing of a particular operator is an entirely separate legal transaction which follows the allocation of the channel; in the CATV situation the local franchising of a particular operator precedes action by the Commission on the application to "allocate" the distant signals to the community or area in which the CATV system proposes to operate. Thus, by this much closer analogy, the CATV distant signal rules should not be considered a licensing scheme, just as the construction and amendment of the table of television allocations is not considered a licensing scheme, see *Transcontinent Television Corp. v. FCC,* 113 U.S. App. D.C. 384, 308 F.2d 339 (1962); *Logansport Broadcasting Corp. v. United States, supra.*

It is true that the term "license" is broadly defined in Section 2(e) of the Administrative Procedure Act [now § 551(8)]. It may be that the form of regulation the Commission has adopted to deal with CATV carriage of distant signals is "licensing" within the APA definition, even

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the unusual situation in which two separate and distinct television markets may be close enough together so that one market is within the Grade B contours of stations in the other market. In these unusual cases a rigid adherence to the Grade B contour as the definition of the "distant signals" might not be realistic, and the Commission has quite wisely reserved the power to define "distant signal" in more realistic terms when it is necessary to do so. 2 F.C.C.2d at 786 n. 69.

though it is not such within the meaning of Section 301 of the Communications Act. However, it is not at all clear what consequences appellant believes should follow that characterization. As we have shown above, CATV systems are subject to the Communications Act and to the regulatory authority of the FCC. That is either true or it is not true. If it is true, it makes no difference whether one conceives of the form of regulation as "licensing" or something else.[13] Surely appellant does not take the position that the Commission may regulate CATV in any way it deems appropriate so long as it does not employ a form of regulation that can be called "licensing." MST firmly believes, and so urged upon the Commission, that distant signal regulation should have been accomplished by means of a general rule prohibiting any CATV system from extending the signal of any television station beyond that station's normal service area into the normal service area of any other television station, except in very limited and carefully defined circumstances. Such an ap-

[13] The Supreme Court decision in Regents of the University System v. Carroll, 338 U.S. 586 (1950), cited by appellant (Brief, p. 24), had nothing to do with this question. In that case the Commission had renewed a radio license only on the condition that the licensee repudiate a stock purchase agreement with a third party, because the agreement jeopardized the licensee's financial ability to operate in the public interest. The agreement apparently contained no provision making it conditional upon FCC approval. The licensee repudiated the contract and, in defense to a breach of contract action in a state court, argued that the Commission's action was a defense because of the Supremacy Clause. The Supreme Court disagreed. It did not disturb, but rather assumed the correctness of, the Commission's action vis-a-vis the licensee. All the Court held was that the Commission could not adjudicate the licensee's private rights vis-a-vis the third party, who was not subject to the Communications Act:

> "We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." 338 U.S. at 602.

That is not what the Commission is trying to do in the CATV rules.

proach would have been within the Commission's power to "establish areas or zones to be served by any station," Section 303(h), and to prevent any person subject to the Act (which includes CATV systems) from extending or otherwise tampering with such areas or zones. This approach would have been a far more stringent regulation of CATV carrying distant signals than the approach the Commission has taken. Yet it could certainly not be argued that there would be any "licensing" involved in the regulatory approach urged by MST, no matter what definition of "licensing" be considered. It would be strange indeed if this more stringent approach, because it does not involve "licensing," would be within the Commission's powers while the lesser approach the Commission took, because it involves a type of approval that could be considered "licensing," would be outside the Commission's power to adopt.

In any event, the chief consequence under the Administrative Procedure Act of labelling a form of regulation as "licensing" is in the procedures that must be followed in connection with applications and with proceedings for withdrawal, suspension, revocation, or annulment, see Section 9(b) [now 5 U.S.C. § 558(c)]. When a license is applied for, the agency must complete the proceedings within a reasonable time, having due regard for the rights and privileges of all interested parties or adversely affected persons. Nothing in appellant's brief suggests that the CATV distant signal rules do not comply with this requirement. Indeed, in determining applications for initial licenses an agency may provide for all evidence being submitted in written form where the interest of any party will not be prejudiced, Section 7(c) [now 5 U.S.C. § 556(d)], whereas the major market distant signal rule contemplates full evidentiary hearings in all cases except when a waiver of the rule is granted. Thus, appellant does not appear to be able to point to any added procedural right which would result from labelling the CATV rules a licensing scheme, and the rules may even provide greater

procedural rights to appellant and other CATV systems than would be required in the case of licensing.

II.

Neither the "Grandfather" Date Nor the Effective Date of the CATV Rules Violates the Administrative Procedure Act.

Appellant next complains of the dates on which certain of the CATV rules were made effective. It argues that the Commission has applied these rules "retroactively" and has violated the Administrative Procedure Act by not waiting to apply the rules until at least April 16, 1966, or thirty days after the rules were formally published in the Federal Register. Appellant recites the expenses it had incurred and the contracts it had made as of the date the rules were announced, apparently hoping for special consideration.

It is not clear what appellant's problem is. Its CATV system did not begin operating until May 18, 1966. Had the Commission's rules been made effective thirty days — or even sixty days — after formal publication in the Federal Register, appellant would be in the same position it is in now. The history of the adoption of the rules makes appellant's argument even more mystifying, especially in the light of appellant's reference to the "haste" (Brief, p. 37) with which the Commission supposedly acted.

The CATV rule-making proceedings were begun on December 14, 1962. After almost two and one-half years of study, on April 23, 1965, the Commission issued the *First Report and Order*, Dockets No. 14895 and 15233, 38 F.C.C. 683, which adopted certain limited rules applicable only to CATV systems receiving signals by microwave. The comments filed in the proceedings, as well as several separate petitions for rule making, had shown that much more was at issue than the limited subjects covered by

Dockets No. 14895 and 15233. As a result, the Commission also issued, on April 23, 1965, the *Notice of Inquiry* and *Notice of Proposed Rule Making* in Docket No. 15971 referred to above. It stated its tentative conclusion that it had statutory authority to address certain regulations directly to CATV systems, including comprehensive regulation of distant signal carriage. The *Notice* also discussed the basis for asserting this authority and described the kind of regulatory approach the Commission was contemplating, "e.g., through a rule which would prohibit the extension of the signal of any television station beyond its Grade B contour into a community" with the potential for one or more independent television stations without "a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community," 1 F.C.C.2d at 472. The *Notice* also "put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not," 1 F.C.C.2d at 477.

The *Notice* was of course published in the Federal Register, 30 Fed. Reg. 6078, and it also received wide publicity otherwise. Extensive comments were filed by several dozen parties, and additional letters and informal comments were received from a great many members of the public. See 2 F.C.C.2d at 726 n. 2, 789-90. The record of the proceedings is over 5,000 pages long. The index to the record, which the Commission had certified in connection with other court proceedings,[14] is itself 105 pages long.

As an owner of multiple CATV systems — including one in the city of Philadelphia itself — and the builder and manager of several additional systems, it is hardly

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[14] Midwest Television, Inc. v. United States, *et al.*, originally Cases No. 19,975 and 20,021 in this Court and subsequently transferred to the United States Court of Appeals for the Eighth Circuit.

likely that appellant was without knowledge of these developments, and no claim of unawareness is made by appellant. Yet appellant went ahead with its plans, gambling that it might be in operation and given "grandfather" rights under such rules as the Commission might ultimately adopt. Appellant lost the race — but not through any "haste" on the part of the Commission or lack of notice to appellant.

It was not until February 15, 1966 — nearly ten months after issuance of the *Notice* — that the Commission released an eight-page Public Notice (Mimeo No. 79927) announcing its plan for regulation of CATV systems whether or not served by microwave radio relay. A press conference was held by the Chairman of the FCC, with Commissioner Cox also in attendance. As one of the "eight major points" in the plan, the Public Notice stated that:

> "Parties who obtain state or local franchises to operate CATV systems in the 100 highest ranked television markets (according to American Research Bureau (ARB) net weekly circulation figures), which propose to extend the signals of television broadcast stations beyond their Grade B contours, will be required to obtain FCC approval before CATV service to subscribers may be commenced. This aspect of the Commission's decision is effective immediately, and will be applicable to all CATV operation commenced after February 15, 1966.
>
> "An evidentiary hearing will be held as to all such requests for FCC approval, subject, of course, to the general waiver provisions of the Commission's rules. These hearings will be concerned primarily with (a) the potential effects of the proposed CATV operation on the full development of off-the-air television outlets (particularly UHF) for that market, and (b) the relationship, if any, of proposed CATV operations and the development of pay television in that market. The hearing requirement will apply to all CATV operations proposed to communities lying within the predicted Grade A service contour of all existing television stations in that market."

Publicity about the Commission's new rules was immediate and widespread. For example, the Commission distributed almost 5,000 copies of the Public Notice on February 15 and during the few days following. Moreover, the National Community Television Association, the trade organization of the CATV industry, sent all its members a newsletter on February 18, 1966, in which it discussed the Public Notice in great detail, attaching a copy.[15]

Thus appellant is, in substance, complaining because it did not receive "grandfather" rights when it commenced operation over three months after widespread public notice of the adoption of the new rules and over two months after the actual rules had been released, publicized, and formally published in the Federal Register. The complaint is a hollow one, to say the least.

Appellant's argument over the "grandfather" date also lacks merit. The rules are not "retroactive."[16] They attach no penalty to conduct occurring prior to their actual publication in the Federal Register, and indeed the only "penalty" imposed upon appellant for commencing operations in flagrant violation of the rules is an order to cease and desist.[17]

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[15] See Memorandum Opinion and Order, Dockets No. 14895, 15233, and 15971, 3 F.C.C.2d 816, 823 nn. 7 and 8 (1966).

[16] Appellant's "retroactivity" argument, insofar as it is directed to Section 74.1105, is especially mystifying, since that rule expressly states that it does not apply to any signals being delivered on March 17, 1966.

[17] Even a retroactive rule is legal if it is reasonable. SEC v. Chenery Corp., 332 U.S. 194 (1947); Welch v. Henry, 305 U.S. 134 (1938). The constitutional prohibition against ex post facto laws applies only to criminal laws. Calder v. Bull, 3 U.S. 385 (1798). A rule that is retroactive is one that attaches legal consequences to conduct engaged in before the rule was adopted or issued. Thus, in *Welch v. Henry*, *supra*, a Wisconsin statute enacted in 1935 made taxable dividends from certain types of corporations in 1933. Here, however, there is no question of retroactivity.

Instead, the question is the appropriateness of February 15, 1966, as a "grandfather" date for the new distant signal rules. It is not uncommon for statutes extending regulatory authority to specified types of business activities to relate grandfather provisions to dates substantially earlier than the date of enactment of the new legislation. For example, Part II of the Interstate Commerce Act, newly extending the authority of the Interstate Commerce Commission to cover motor carriers, was enacted — and was "effective" — on August 9, 1935. 49 Stat. 543, 49 U.S.C. §§ 301 *et seq.* However, grandfather rights were limited to carriers or predecessors in interest who were in bona fide operation on June 1, 1935. 49 U.S.C. § 306(a)(1). Similarly, after admission of Alaska to statehood, Part II of the Act had to be amended to cover common carriers by motor vehicle between Alaska and the other states. This was done by Public Law 86-615 enacted July 12, 1960, 74 Stat. 382, but grandfather rights were limited to common carriers by motor vehicle engaged in business as of August 26, 1958. 49 U.S.C. § 306(a)(4), (5).[18]

By hypothesis a business enterprise that operates under "grandfather" rights is one that is not required to make the showing, otherwise required by law, that it is operating in the public interest. This suggests that purported "grandfather" rights should be strictly construed, for the public interest should be considered paramount so long as basic notions of fairness to private parties are observed.

> "The applicant for a certificate under the grandfather clause seeks to exempt his further operations from scrutiny as to public convenience and necessity . . .

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[18] For similar provisions, see Part III of the Interstate Commerce Act, dealing with common carriers by water, added September 18, 1940, and limiting grandfather rights as of January 1, 1940, 49 U.S.C. § 909(a), and also the Civil Aeronautics Act of 1938, Sec. 401(e), 52 Stat. 973, 988, enacted June 23, 1938, which limited grandfather rights as of May 14, 1938.

> As the Motor Carrier Act is remedial, and the grandfather clause confers a special privilege, the proviso defining exemptions is to be held to extend only to carriers plainly within its terms." *Gregg Cartage & Storage Co. v. United States*, 316 U.S. 74, 83 (1942); see *Alton R.R. v. United States*, 315 U.S. 15 (1942).

A determination under a grandfather provision does not involve an issue of "constitutional" fact. *Transamerican Freight Lines, Inc. v. United States*, 51 F. Supp. 405, 409 (D. Del. 1943).

It is quite clear that if a "grandfather" date later than February 15 had been adopted, the Public Notice would have stimulated even more extraordinary efforts by CATV entrepreneurs to rush completion of enough construction to begin operating in time to acquire "grandfather" rights under the rules as formally issued. At the time of the Public Notice there were approximately 1,600 CATV systems operating, over 1,000 systems franchised but not yet operating, and approximately 2,000 applications for franchises pending before various city councils throughout the country.[19] Indeed, one of the dominant characteristics of the CATV industry has been its fantastic growth during the last few years.[20] And that growth appears to have increased, rather than diminished, since April 23,

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[19] See Memorandum Opinion and Order, *supra* note 15, at 821. This citation is to the Commission action denying petitions to stay the effectiveness of the rules adopted by the *Second Report and Order*. Various parties exercised their right not only to petition for reconsideration of the *Second Report and Order* but also to ask that the rules not be made effective until the petitions for reconsideration were disposed of. Many of these petitions and stay requests raised the same arguments appellant is raising here, including the "retroactivity" argument, and in disposing of this argument the Commission amplified the basis for its "grandfather" date by bringing the record up to date.

[20] Figures recently released by Television Digest (vol. 7, no. 9, Feb. 27, 1967), a well-known trade publication, show that this growth continues even past the issuance of the *Second Report and Order*. There were 1,570 operating CATV systems with

1965, when the Commission "put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." *Notice, supra,* 1 F.C.C.2d at 477. [21]

The foregoing also disposes of the objection to the Commission's action making the distant signal rules effective upon, rather than after, their publication in the Federal Register. The Administrative Procedure Act provides that in the ordinary case rules should be made effective at least thirty days after they are published or served upon the parties to which they apply. The Act recognizes, however, that good cause may exist for a different procedure, and appropriate exception is provided for. As the Commission has found, 2 F.C.C.2d 784-85,[22] and as we have shown, good cause for a different procedure does exist here. Given the selection of the February 15 date (which we have shown was properly intended to stop the proliferation of new systems and extension of existing systems into new areas) there was no

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1,575,000 subscribers on Jan. 1, 1966, an increase of 245 systems and 300,000 subscribers over the Jan. 1, 1965 figures. The totals as of Jan. 1, 1967, were 1,770 systems and 2,100,000 subscribers, an increase of 200 systems and 525,000 subscribers since a year earlier.

[21] Appellant seeks to dismiss this warning by asserting that the Commission had previously expressed doubts about its statutory authority to regulate non-microwave CATV. In view of the extensive treatment the Commission gave to the jurisdictional question in the *Notice*, 1 F.C.C.2d at 464-54, 478-82, the prior Commission considerations of this question are hardly relevant. Moreover, the Commission did hold in 1959 that CATV systems could not be regulated as common carriers or television broadcast stations (or under any "plenary power" of the Commission), but the Commission did not consider the legal grounds on which it ultimately based its direct regulation of CATV. See *CATV Systems and Auxiliary Television Services*, 18 R.R. 1573, 1595 (1959).

[22] See also Memorandum Opinion and Order, *supra* note 15, at 821.

reason whatever to delay the "effective" date of the distant signal rules. Postponing enforcement of the new rules would merely have increased claims by CATV systems that the Commission should not enforce the rules because of disruption of service, greater investment, and the like. No reason appears why the Commission should have stayed its hand in these circumstances, particularly where there was wide publicity of the substance of the rules a month before they were formally published in the Federal Register.

III.

Neither the Rules Regulating CATV Carriage of Distant Signals nor the Order Under Review Abridges First Amendment Rights.

Appellant's CATV system, until ordered to cease and desist, was taking distant television signals from the air and, without any payment to the originating stations and without securing their permission, was merchandising those signals to subscribers. In doing so it was bringing into its community many programs for which local and area television stations had purchased exclusive broadcast rights. These activities of a CATV system, according to one court of appeals, "could be described as '* * * inconsistent with a finer sense of propriety * * *'. . . ."[23]

Appellant argues that the FCC's regulation of these activities abridges appellant's right of free speech. As a corollary, it is argued that the order requiring appellant to cease and desist from violating the Commission's regulations is likewise invalid under the First Amendment.

Preliminarily, it should be observed that appellant occupies no preferred position under the First Amendment

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[23] Cable Vision, Inc. v. KUTV, Inc., 355 F.2d 348, 352 (9th Cir. 1964), *cert. denied sub nom.* KLIX Corp. v. Cable Vision, Inc., 379 U.S. 989 (1965).

merely because its business activity is related to communications. Certainly appellant, no less than a newspaper publisher, is "engaged in business for profit exactly as are other businessmen who sell food, steel, aluminum, or anything else people want," *Associated Press v. United States*, 326 U.S. 1, 7 (1945), and in conducting that business it is subject to reasonable and proper laws and regulations.

Moreover, it must be assumed, in considering appellant's First Amendment claim, that the Commission has the statutory authority to regulate CATV systems which do not employ microwave radio facilities; if it does not have this authority the First Amendment question is not reached. From this assumption it follows that the Commission was reasonable in concluding (1) that CATV systems, if left unregulated, could transport the signals of the largest metropolitan television stations into other areas across the country, (2) that this could fragment the audiences, and hence impair the viability, of existing and prospective television stations in those areas, and (3) that this result would be contrary to the public interest as manifested in the table of television assignments and the all-channel receiver law.

In view of these conclusions, and in view of the way the CATV distant signal rules actually operate, appellant's First Amendment claim is without substance.

The rules do not "prohibit" any CATV activity. Nor do they, especially in conjunction with the *Second Report and Order*, lack ascertainable standards to be followed by the Commission in acting under the rules. Therefore, cases like *Saia v. New York*, [24] *Martin v. Struthers*,[25] and similar cases cited by appellant are not in point.

Saia, for example, involved a city ordinance which prohibited the use of loudspeakers unless prior permission

[24] 334 U.S. 558 (1948).

[25] 319 U.S. 141 (1943).

had been obtained from the Chief of Police. No standards to be followed by the Chief were prescribed, thus leaving the decision whether or not to issue permission in a particular case to his "uncontrolled discretion," 334 U.S. at 560-61. The Court struck down the statute as unconstitutional on its face.

Martin v. Struthers was even more oppressive, for the prohibition there (against door-to-door distribution of handbills or advertisements) was absolute.[26] Thus, even a person who desired to receive such material could not do so despite the fact that, as appellant points out, that person's choice would not interfere with the rights of others. With regard to CATV, however, the choice of some people in a given area — to subscribe and receive distant signals — can interfere with the rights of others: If it prevents a new station from coming on the air, for example, the increased service to the subscribers (assuming there is a real increase) will deprive non-subscribers of increased service they would otherwise have enjoyed.[27]

[26] The same is true of Weaver v. Jordan, 411 P.2d 289 (Calif.), *cert. denied*, 385 U.S. 844 (1966). The court there struck down a state statute which totally proscribed subscription television in California, whether by closed circuit cable or by radio broadcast, and whether charge was made by the program or the month or some other basis. The court referred to this as a "sweeping suppression" of subscription television, "a complete ban of expression and communication through a specified medium," 411 P.2d at 295.

Prohibiting distant signal importation would not even constitute a "sweeping suppression" of CATV, let alone a "complete ban" of expression or communication. The distant signal rules are much more like the rules upheld in *National Broadcasting Co. v. United States*, *supra*. According to the court in *Weaver*, those rules differed from the subscription television statute in that the rules were designed "to *avoid* practices which would hinder growth of new networks and would deprive the listening public in many areas of service and would deprive local stations of much of their choice of programs," 411 P.2d at 298-99. (Emphasis is the court's.)

[27] This treatment of *Saia*, *Martin*, and other such cases would not preclude the constitutionality of a general rule prohibiting

The chief difficulty with appellant's argument is, as with its jurisdictional argument, in its emphasizing of reception of television signals. As shown above, CATV systems *transmit* and *distribute* television signals; they "are not passive antennas." *United Artists Television, Inc. v. Fortnightly Corp., supra.* The table of television assignments has long governed the location and service areas of television stations. The multiple ownership rules and duopoly and concentration rules have long controlled the number and location of television stations which an entity may own or control and the extent to which the signals of its stations may be extended. The rules and policies with respect to the operation of satellites and translator stations also limit the extension of the signals, and hence of the programs, of particular stations. None of these Commission rules or policies is subject to First Amendment challenge on the ground that it limits the range of the signals of television stations. *Cf. National Broadcasting Co. v. United States, supra,* 319 U.S. at 226-27. No such rule or order has ever been struck down on First Amendment grounds. Certainly it is clear that a CATV system has no greater rights under the Constitution to extend a broadcast station's signals than the station itself has. When the Commission determines that a CATV system may not transmit the signals of a television station it is not regulating program content. It is merely determining where and under what circumstances the signals of those stations may be carried. This is precisely what the Commission does with television stations. The FCC is not required in the name of free speech to allow the stations in New York, Los Angeles and Chicago to operate satellite television stations

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CATV systems from extending the signals of television stations beyond their normal service areas except in limited and carefully defined circumstances where no threat would be posed to the viability of existing and potential television broadcast stations, and MST urged just such a rule upon the Commission. See pp. 16-17, *supra.*

and translators throughout the United States for the purpose of having their signals transmitted nationwide.

Indeed, the distant signal rules are expressly designed to advance true freedom of speech — the freedom of all the people, rich and poor, urban and rural, to be exposed to the widest possible variety of both national and local news, viewpoints and entertainment. In the expert judgment of the FCC that freedom — and the correlative right of broadcasters to present the news, viewpoints and entertainment — would be injured by unchecked development and expansion of CATV carrying distant signals. For this Court to strike down the distant signal rules on First Amendment grounds would require the Court to conclude that the Commission's judgment was totally arbitrary and unreasonable. MST respectfully suggests that the Court should not and cannot reach such a conclusion. *Cf. Associated Press v. United States, supra,* 326 U.S. at 20:

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."

CONCLUSION

The order under review should be affirmed.

Respectfully submitted,

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March 14, 1967

REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,387

TELESYSTEMS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

PHILADELPHIA TELEVISION BROADCASTING CO., ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC., and WESTINGHOUSE BROADCASTING COMPANY, INC.,
Intervenors.

Appeal from a Decision and Order of the Federal Communications Commission

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REPLY BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

There is no disagreement concerning the basic facts of this case. However, in large part the legal arguments of the Commission and the intervenors are directed to issues

which TeleSystems either did not raise or specifically waived. The pivotal question is not whether the Commission has jurisdiction over CATV systems (which TeleSystems expressly conceded for the purpose of this appeal),[1] but whether Sections 74.1105 and 74.1107 of the Commission's Rules were properly adopted, and if so, whether they constitute lawful regulation of CATV systems. The Commission seeks to excuse many of the legal shortcomings of its CATV rules by the emotionally charged claim that "indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it."[2] Even if true, such a statement would not justify unlawful regulation of CATV. However, the Commission's obvious and unwarranted attempt to create an atmosphere of uncontrolled crisis is so totally inaccurate that TeleSystems is obliged to correct the record.

While the public's demand for more and better television reception in 1965 and early 1966 had generated considerable activity for CATV franchises throughout the United States, only a few systems actually had been constructed in major markets on February 15, 1966.[3] The Commission's generalization concerning alleged "indiscriminate CATV development" fails to note this critical distinction. Thus, it is highly unlikely that circumstances then prevailed which warranted the issuance of a virtual

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[1] See footnote to Question Presented Number One in appellant's brief. TeleSystems believes that the record in this appeal from a cease and desist order is not adequate to deal with the question of the Commission's basic jurisdiction over CATV.

[2] FCC Brief, p. 38.

[3] Virtually all of the CATV systems in this category are involved in appeals of the Commission's action. *Buckeye Cablevision, Inc.* v. *FCC*, Case No. 20,274, D.C. Cir.; *Booth American Co.* v. *FCC*, Case No. 20,367, D.C. Cir., January 26, 1967; *Jackson TV Cable Co.* v. *FCC*, Case No. 20,468, D.C. Cir.; *Back Mountain Telecable, Inc.* v. *FCC*, Case No. 20,642, D.C. Cir.; *Mission Cable TV, Inc.* v. *FCC*, Case No. 21,192, 9th Cir.

death penalty to TeleSystems' Springfield Township CATV system. Nor does it follow that Commission recognition of TeleSystems' actual status as the owner of an operational CATV system on February 15, 1966 would have required similar treatment of companies which merely held CATV franchises or which had only just begun construction of systems in major markets. The plain fact is that the Commission over-reacted to broadcasters' vigorous pleas for protection from CATV. Without seeking any evidence whatsoever on the likely harm to companies such as TeleSystems which had proceeded properly and legally with the construction of CATV systems, the Commission announced on February 15, 1966 that from that date forth no CATV system in a major market could commence supplying distant signals to its subscribers without having received Commission approval.

With respect to its zealous allegation that CATV feeds on the broadcasting service, the Commission, in fairness, should have noted that CATV's carriage of broadcast signals recently was held to constitute a copyright infringement of the programming contained in such signals,[4] and further that the Committee on the Judiciary of the House of Representatives reported out a bill in the past few weeks which would make CATV fully subject to copyright liability in virtually every situation except where the CATV system carries only local television stations.[5] We realize, of course, that neither a single district court decision nor a proposed bill establishes a general rule applicable to the entire CATV industry. Nonetheless, the obvious trend toward making CATV subject to copyright liability indicates that a sounder basis exists under the law for maintaining a healthy relationship between CATV

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[4] *United Artists Television, Inc.* v. *Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y. 1966).

[5] H.R. 2512, 90th Cong., 1st Sess. § 111 (1967).

and broadcasting than the artificial and unlawful standards which were rushed into effect by the Commission.

I. Assuming Arguendo That The Commission Has Jurisdiction To Regulate CATV, Such Jurisdiction Would Not Include Authority To Limit Or Restrict The Off-The-Air Reception Of Television Signals

While denying any intent to regulate television reception, the Commission nonetheless argues that it "has authority to prescribe by rule the conditions under which a television signal may be extended through the medium of a community antenna system, in order to prevent frustration of the Congressional scheme of television regulation . . . ." [6] If the Commission has the power to restrict off-the-air reception at the receiving point (in addition to its acknowledged authority over the radio transmitting source) the complexity and sophistication of the regulated receiving device legally is immaterial. The Commission's claimed authority to prevent the extension of television signals logically would have to apply to any "connecting link in the chain of communication between the point of origin . . . and reception by the viewing public" [7] whether it be a CATV system, a normal home antenna or the television receiver itself. We do not contest the Commission's possible jurisdiction over the latter devices, but we vigorously dispute the agency's power to prevent the extension (which inescapably is synonymous with reception in the context of this case) of television signals which are picked up off-the-air by a community antenna system and delivered to the public without the use of a radio transmitter. The Commission argues that TeleSystems' interpretation of the Communications Act is too narrow, and yet it cites no provision of that Act which could even remotely confer any such authority.

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[6] FCC Brief, p. 16.

[7] Second Report and Order, Docket Nos. 14895, 15233 and 15971, 2 F.C.C. 2d 725, 794 (1966).

We readily acknowledge that CATV is more than a passive antenna, but its capacity to extend a television signal received off-the-air differs from a normal home antenna only by a matter of degree. In claiming that CATV systems "are in fact distribution systems whereby signals may be carried hundreds of miles beyond their point of origin and delivered to subscribers far beyond the normal range or service area of the stations involved," [8] the Commission must be alluding to radio microwave-served systems which are not involved in this appeal.[9] TeleSystems' CATV system in Springfield Township depends solely upon the reception of off-the-air signals which have been broadcast by a duly licensed television transmitter, and it is aware of no instance in which any such system has carried the signal of a television station located more than about 150 miles from the CATV system. In any event, the question of distance legally is immaterial, since the Commission claims that it could prevent a Washington, D.C., CATV system from distributing the Grade A quality signal of a Baltimore, Maryland television station,[10] which according to the Commission's own definition is a "good signal . . . received for 90 per cent of the time at the best 70 per cent of locations." [11] Thus, in order to prevent the supposed frustration of Congressional schemes, the Commission asserts the power to prevent CATV's from carrying signals which regularly can be received in a community through the use of ordinary "rabbit ear" antennas.

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[8] FCC Brief, p. 17.

[9] TeleSystems concedes the Commission's authority to deny licenses for microwave radio stations in any situation where the applicant for such a station fails to establish affirmatively that the public interest would be served by a grant of its application. See *Carter Mountain Transmission Corp.* v. *FCC*, 116 U.S. App. D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951 (1963).

[10] See Second Report and Order, *supra*, 2 F.C.C. 2d at 786, n.69.

[11] FCC Brief, p. 5 n.5.

TeleSystems will not repeat its review of Sections 303 (h), 303(r) and 307(b) of the Communications Act,[12] but it is appropriate to note that the Commission has pointed to no legal decision which purports to extend the applicability of those provisions beyond the licensing and regulation of radio transmitters. Contrary to the Commission's contentions, the case of *American Trucking Ass'n* v. *United States*, 344 U.S. 298 (1953), is not pertinent. In that case, the ICC had found that certain authorized carriers were expanding their certificated routes through leasing arrangements with owner-operated trucks which were exempt from common carrier regulation under the Interstate Commerce Act. 344 U.S. at 302-303. The ICC, therefore, adopted rules which established conditions governing the use of such non-owned equipment by authorized carriers. 344 U.S. at 308. Thus, the ICC sought to prevent a frustration of Congressional objectives by expanding its acknowledged jurisdiction over authorized motor carriers. Conversely, Sections 74.1105 and 74.1107 of the CATV Rules are not merely expansions of the Commission's plenary authority over radio transmitters; they represent an attempt to regulate an entirely new area of communication, *i.e.*, the right of the viewing public to receive a signal which is present in the air, for CATV (in the absence of microwave) is nothing more than that. This truly is an awesome power and one which we do not believe should be lightly inferred in the absence of an express Congressional delegation.

II. TeleSystems Had The Status Of A Licensee On March 17, 1966, And, Accordingly, No Suspension Of Its Activities Could Have Been Ordered Without A Hearing

TeleSystems established in its brief that the adoption of Sections 74.1105 and 74.1107 of the Commission's Rules constituted licensing because they require the suspension

[12] 48 Stat. 1082, 47 U.S.C. § 303(h); 48 Stat. 1082, 47 U.S.C. § 303(r); 48 Stat. 1083, 47 U.S.C. § 307(b).

of an activity otherwise lawful, and prior Commission approval before the commencement of such an activity. TeleSystems agrees with the Commission that the "CATV rules do not purport to establish a licensing structure analogous in any sense to that which applies to radio stations pursuant to Title III of the Communications Act." [13] The Commission argues, however, that "it makes no difference whether its actions are termed 'licensing' or something else." TeleSystems submits that it makes a critical difference, because the Commission's licensing authority is carefully delineated in the Communications Act. However, even assuming that the Commission may exercise licensing functions not mentioned in the Communications Act, it cannot thereby violate procedural safeguards which are contained in the Administrative Procedure Act.

Simply put, if TeleSystems was legally conducting an activity which the Commission's Rules sought to suspend, Section 9(b) of the Administrative Procedure Act required the Commission first to afford TeleSystems the opportunity in a hearing "to demonstrate or achieve compliance with all legal requirements." [14] The Commission's CATV Rules, however, unlawfully reversed the procedures of the Administrative Procedure Act. They require the CATV system to suspend its operations until *after* the Commission has conducted a full hearing.[15] The Commission's Rules thus provide in practical effect that the CATV system must go out of business until the Commission is

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[13] FCC Brief, p. 20.

[14] 60 Stat. 242, 5 U.S.C. § 1008(b).

[15] Speaking of Section 74.1107, the Commission has stated:

"All that the rule requires is that distant signal operations commenced after February 15 be *suspended on or after March 17, 1966, pending the requisite hearing on the merits. Buckeye Cablevision, Inc.*, 3 F.C.C.2d 808, 822 (1966). (Emphasis added.)

able to hold a hearing on the question of whether it should be permitted to resume operations.

The Commission notes that TeleSystems did not actually commence commercial operations until May 18, 1966, and that issues under the Administrative Procedure Act, therefore, are unavailable to appellant. In answer, we merely recite two uncontested facts:

(1) Prior to February 15, 1966, TeleSystems' Springfield Township CATV system was operational and was receiving television signals off-the-air from stations located in Philadelphia, Pennsylvania, and New York, New York. (R. 36-37.)

(2) On February 15, 1966, the Commission released a public notice which stated, in part:

> "Parties who obtain state or local franchises to operate CATV systems in the 100 highest ranked television markets . . . , which propose to extend the signals of television broadcast stations beyond their Grade B contours, will be required to obtain FCC approval *before* CATV service to subscribers may be commenced. *This aspect of the Commission's decision is effective immediately, and will be applicable to all CATV operation commenced after February 15, 1966.*" [16] (Emphasis added.)

The Commission now contends that notwithstanding the clear proscription in that notice, since TeleSystems did not commence commercial operations before the CATV Rules legally became effective on March 17, 1966, it does not have standing to raise issues under the Administrative Procedure Act. Stated otherwise, TeleSystems is alleged to have waived legal rights because it relied on an apparently unlawful notice of the Commission.

Such a position cannot be sustained, and this appeal should be decided on the legal premise that TeleSystems

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[16] FCC Public Notice G-79927 (February 15, 1966).

was operating a CATV system in Springfield Township prior to the effective date of the Commission's CATV Rules.[17] If that premise be accepted, as we submit it must, the only procedure by which the Commission lawfully could have suspended such operations was to follow the notice and hearing requirements of Section 9(b) of the Administrative Procedure Act. The cease and desist hearing under Section 312 of the Commications Act[18] plainly does not satisfy such requirements. The only issue open to TeleSystems in the cease and desist proceeding was whether or not it had complied with a rule which required the immediate suspension, without a hearing, of an otherwise lawful activity.[19]

Perhaps the procedure which appellant contends is legally required might have inconvenienced the Commission somewhat, but the critical need for the type of hearing contemplated by the Administrative Procedure Act, *before* suspension, is dramatically illustrated by this case. TeleSystems began work on its Springfield Township

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[17] Instead of commencing operation immediately after February 15, 1966 in violation of the Commission's dictate of that date (as it technically was capable of doing, since its system had been constructed and was fully operational), TeleSystems filed a petition for reconsideration of the Commission's Second Report and Order. However, after realizing that irreparable injury undoubtedly would result to its CATV system prior to a final disposition of the reconsideration proceeding, TeleSystems determined to commence commercial CATV operations in Springfield Township on May 18, 1966, "as a means of obtaining a timely judicial decision on the merits of its case alone . . . ." (R. 4.)

[18] 48 Stat. 1086, as amended, 74 Stat. 893, 47 U.S.C. § 312(b).

[19] As the Commission said with respect to the hearing given TeleSystems:

> "[T]his type of proceeding would as a general rule be limited to determining whether there was a violation of our rules, with other matters (such as hardship) going to possible waiver of our rules being considered in separate proceedings following the filing of an appropriate petition for waiver (and compliance, in the meantime, with our Rules) or hearing. (R. 118.)

CATV venture in 1964, when the Commission specifically had disclaimed any authority to regulate off-the-air CATV systems.[20] The Commission's action of February 15, 1966 left that $250,000 investment standing useless. Had the Commission inquired, it might have learned that TeleSystems' Springfield Township operation represented such a *de minimis* threat to any valid public interest consideration that its virtual destruction was unnecessary. The Commission, however, has denied TeleSystems this minimal procedural right.

III. The Commission's Attempt To Show Compliance With The Administrative Procedure Act In Its Application Of Sections 74.1105 And 74.1107 Of Its Rules Is Without Merit

TeleSystems established in its brief (1) that the Commission effectuated Sections 74.1105 and 74.1107 of the CATV Rules in violation of Sections 3(a)(3) and 4(c) of the Administrative Procedure Act,[21] and (2) that, in so doing, the Commission violated not only the letter of the law but also flagrantly ignored express Congressional intent as to the proper application of Section 4(c).[22] Just as the Commission's attempted justification of these actions fell woefully short in its Second Report and Order (and elsewhere), its limited attempted explanation thereof in its brief is likewise inadequate.

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[20] The first indication that the Commission might reverse its decision in *CATV and TV Repeater Services*, 26 F.C.C. 403 (1959), and seek to regulate CATV directly did not come until April of 1965 with the *Notice of Inquiry and Notice of Proposed Rule Making*, Docket No. 15,971, 1 F.C.C.2d 453. By that time, TeleSystems, a company engaged solely in the construction and ownership of CATV systems, could no more abandon its Springfield Township CATV project than it could on February 15, 1966.

[21] 5 U.S.C. §§ 1002(a)(3), 1003(c).

[22] See S. Rep. No. 752, 79th Cong., 1st Sess. 15 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 25 (1946).

A. *Section 74.1107 Of The Commission's Rules Was Applied Retroactively Prior To Its Effective Date*

As noted above, in its Public Notice dated February 15, 1966, the Commission stated: "This aspect of the Commission's decision [*i.e.*, the Section 74.1107 proscription on new CATV services] is effective immediately, and will be applicable to all CATV operation commenced after February 15, 1966." [23] Since the Commission's rules were not published in the Federal Register until March 17, 1966,[24] the earlier effectuation of Section 74.1107 is a clear violation of Sections 3(a)(3) and 4(c) of the Administrative Procedure Act, which together prohibit the effectuation of agency rules prior to publication thereof in the Federal Register.

In spite of the plain and unequivocal meaning of its February 15th announcement, the Commission rather incredibly argues in its brief that "the rule itself became effective as of March 17, 1966 [the date of publication], and only those systems which operate in violation of its terms after that date are subject to sanctions." [25] This argument is a mysterious one indeed, and is refuted by the Commission's own prior admission that systems beginning operation between February 15 and March 17, 1966, are subject to cease and desist proceedings.[26] Surely the Commission cannot be serious in contending that an order to cease operations is not a "sanction."

The Commission seeks to whitewash the unlawfulness of the procedure by labelling it "grandfathering," [27] as if the mere mention of that term resolves all questions concern-

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[23] *Supra* n.16.

[24] 31 Fed. Reg. 4540.

[25] FCC Brief, p. 32.

[26] See *Buckeye Cablevision, Inc., supra* n.15, 3 F.C.C.2d at 822.

[27] FCC Brief, p. 29.

ing the legality of the action taken. TeleSystems does not quarrel with the Commission's decision to exempt from Section 74.1107 requirements those systems which were operating on February 15, 1966. It is the Commission's further attempt to take away rights as of February 15, 1966 which forms the basis of TeleSystems' objections. Thus, "grandfathering" connotes an exemption for some from a particular regulation which an agency could have applied to all. The term is inappropriate where, as here, the agency could not lawfully apply the particular regulation to *anyone* until after its effective date.

The question, therefore, is not whether the Commission could permit CATV systems which were operating on February 15, 1966 to continue, but whether it could suspend, without a hearing, the activities of those systems which did commence or were in a position to have commenced operating at any time before the earliest legal effective date of Section 74.1107. This point is clearly illustrated by the examples of valid "grandfathering" which have been cited by the Commission and by intervenor MST.[28] The Commission relies particularly on a "grandfather" provision in Section 206 of the Motor Carrier Act of 1935, 49 U.S.C. § 306.[29] While the latter provision did "grandfather" certain carriers as of a date prior to its effective date, it significantly permitted all non-exempt carriers which also were operating before the enactment of Section 206 to *continue their operations until the agency involved determined whether a certificate of public convenience and necessity should issue.*[30] Conversely, Section 74.1107 of

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[28] Both the Commission and MST cite Part II of the Interstate Commerce Act, 49 U.S.C. § 306(a)(1) (motor carriers). MST also cites Part III of the Interstate Commerce Act, 49 U.S.C. § 909(a) (water carriers), and the Civil Aeronautics Act of 1938, Sec. 401(e), 52 Stat. 973, 988.

[29] FCC Brief, p. 29.

[30] The last sentence of Section 206(a)(1) provides: "Pending the determination of any such application the continuance of such

the Commission's Rules requires a suspension of previous operations until a full hearing is held. This is the distinguishing factor which makes the Commission's action here under review unlawful. Moreover, it is of further significance that every example cited by the Commission and MST is a statutory "grandfather" provision as opposed to an agency rule. Congress simply has not chosen to impose upon itself the restrictions which it imposed upon federal agencies by the enactment of Sections 3(a)(3) and 4(c) of the Administrative Procedure Act. When Congress makes clear its intention that no agency rule "requiring action may be effective until a legally reasonable time after its issuance as judged in the light of all the circumstances," [31] that intention must be given effect.

B. *The Commission Did Not Satisfy The Statutory Test Of Good Cause To Warrant An Exception To The 30-Day Notice Requirement Of Section 4(c) Of The Administrative Procedure Act*

Section 4(c) of the Administrative Procedure Act provides, in pertinent part, as follows:

> "The required publication or service of any substantive rule . . . shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule." [32]

TeleSystems will not repeat its documentation of Congress's intended application of this section which reviewed the types of urgencies which might establish "good cause" for early effectuation of agency rules. Suffice it to say that the essence of the intent of Congress is that parties

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operation shall be lawful." The other statutes cited by MST contain similar provisions.

[31] H.R. Rep. No. 1980, *supra* n. 22, at 26.

[32] 5 U.S.C. § 1003(c).

affected by agency rules be given a reasonable opportunity to order their affairs before such rules become effective.

The Commission attempts to bypass this important procedural safeguard by calling the "good cause" requirement of Section 4(c) a matter of agency "discretion," [33] and seeks to shift the burden to TeleSystems to prove that the Commission has abused its discretion.[34] The Commission thus overlooks statements appearing in both the House and Senate Reports which state unequivocally that the "good cause" exception "is not an 'escape clause' which may be exercised at will but requires legitimate grounds supported in law and fact by the required finding." [35] The burden of showing good cause rests squarely upon the Commission, not upon TeleSystems.

The Commission's cavalier expression of concern, as yet wholly unsubstantiated, over the growth of CATV [36] simply does not establish the kind of urgency required by Congress for dispensing with the 30-day delay provision. As TeleSystems pointed out in its brief, the Commission has made no findings which support "in law and fact" its instant effectuation of Sections 74.1105 and 74.1107. To the contrary, the Commission expressly has admitted that it does not know whether there is the type of urgency that otherwise conceivably might justify its actions. For example, in its Second Report and Order the Commission stated: "The plain fact is that on the record before us, it is not possible to give a definite answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, corres-

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[33] FCC Brief, p. 33.

[34] FCC Brief, p. 34.

[35] S. Rep. No. 752, *supra* n. 22, at 15; H.R. Rep. No. 1980, *supra* n. 22, at 26.

[36] FCC Brief, p. 34.

pondingly, to what its impact will be upon UHF developments in these markets." [37] And since the Commission refused to take evidence as to the particular circumstances surrounding TeleSystems' activities (including hardship),[38] it certainly cannot support "in law and fact" the premature effectuation and application of the rules to TeleSystems.

Both the Commission and the intervenors attempt to befog the issues in this appeal with frequent references to the fact that the Commission announced as early as April, 1965 that it might enact rules applicable to non-microwave CATV.[39] The Commission even goes so far as to assert that the 1965 announcement gave TeleSystems a reasonable chance to order its affairs.[40] These arguments evade the point. First, TeleSystems had begun work on its Springfield Township venture in 1964, at a time when the Commission specifically had disclaimed jurisdiction over non-microwave CATV systems. Second, as confirmed by Congress in its enactment of Section 4(c) of the Administrative Procedure Act, persons are obligated to conduct their affairs in accord with properly enacted rules, not on the basis of regulations which may or may not be enacted as the result of prospective or pending rulemaking proceedings. Third, even assuming the Commission's April, 1965 action could be construed as notice of possible future regulation, such "notice" certainly did not indicate that the regulation would be retrocatively applied in such a way as effectively to destroy existing investments. Finally, the purpose of rulemaking proceedings is to decide *whether or not* regulations should be adopted, and not, as the Commission's reason-

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[37] Second Report and Order, *supra* n. 7, 2 F.C.C.2d at 773.

[38] R. 118.

[39] *E.g.*, FCC Brief, p. 34; MST Brief, pp. 18-19, 23-24.

[40] FCC Brief, p. 34.

ing would lead one to believe, for the purpose of building a record (inadequate in this case) to substantiate a decision long before finally determined.

IV. The Adoption Of Section 74.1107 And The Issuance Of The Cease And Desist Order Unlawfully Abridge Appellant's Constitutionally Protected Right Of Freedom Of Speech

In its brief, TeleSystems established that the right to deliver information through the use of CATV facilities is protected by the First Amendment, but made no claim that the freedom thus guaranteed is absolute. While agreeing in general,[41] the Commission asserts that appellant's First Amendment argument with respect to the restraints imposed on CATV by Section 74.1107 of the Commission's Rules is foreclosed by the Supreme Court's decision in *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).[42] That case upheld certain broadcasting licensing regulations, against a claim of infringement of First Amendment rights, on the ground that because of the limited number of frequencies in the radio spectrum, broadcasting "inherently is not available to all." In view of this natural limitation, reasonable licensing regulations, based on a standard of "public interest, convenience, or necessity," are a permissible restraint on the right to inform by radio. 319 U.S. at 227.

The Commission also relies on *Carter Mountain Transmission Corp.* v. *FCC*, *supra* n.9, and on *Idaho Microwave, Inc.* v. *FCC*, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965), in attempting to sustain the constitutionality of Section 74.1107.[43] Although the Commission's actions in those cases did affect CATV in some respects, the action in each instance was sustained because of the Com-

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[41] FCC Brief, p. 35.

[42] FCC Brief, p. 36.

[43] FCC Brief, p. 36.

mission's unquestioned authority to license radio facilities. Appellant does not contest that licensing authority of the Commission, even where the granting or denying of a license may directly or indirectly affect a CATV system. But appellant vigorously rejects the Commission's contention that the three cases discussed above in any way can be dispositive of the constitutional issues presented in this appeal.

The Commission asserts that its "effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations." [44] If the touchstone of the permissible restraints on First Amendment freedoms is the Commission's "effort to preserve local television," it would seem to make little difference whether the suppressed medium was CATV, newspapers, books, or movie theatres, all of which have a competitive impact on local television. None, however, is inhibited by the "limited spectrum" factor with respect to radio which provided the rationale of the *National Broadcasting* case. Thus, the factor which was of critical importance in sustaining the infringement of First Amendment rights of those who seek radio licenses is totally absent with respect to CATV. Its capacity to deliver diverse programming sources to the public is limited only by the economics and technology of the CATV industry.

Since the *National Broadcasting* case cannot be stretched to justify the Commission's abridgment of appellant's First Amendment rights, the question remains whether the Commission's action is otherwise justifiable. In considering this question, it must be stressed that permissible restrictions on First Amendment rights are severely limited. Where there is, as here, a direct infringement of speech, "any attempt to restrict those liberties

[44] FCC Brief, p. 38.

must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger . . . ." [45]

The Commission in its brief apparently seeks to establish the presence of such a danger, for it states that "indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it." [46] If the Commission had documented such a bold assertion through appropriate evidentiary proceedings, then possibly its action might be justified. But the truth of the matter is that the Commission has made no such findings. Indeed, only one page removed from its above-quoted derogation of CATV, the Commission admits that it "has not finally resolved whether the effect of CATV on UHF will be harmful nor, conversely, whether CATV provides competitive stimulation." [47] The Second Report and Order is replete with similar admissions. For example, as noted above, at one point the Commission stated: "The plain fact is that on the record before us, it is not possible to give a definite answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets." [48] Unless such action by the Commission is based on a sounder foundation than pure speculation, it simply cannot impose a sweeping ban on a Constitutionally protected medium of communications.

CONCLUSION

The approach followed by the Commission's Office of General Counsel in this case is far from atypical. Basic-

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[45] *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).

[46] FCC Brief, p. 38.

[47] FCC Brief, p. 40.

[48] *Supra* n. 37.

ally, it is urged that a great problem existed, that the Commission in its wisdom has solved it, and that this Court should not be so unwise as to disagree with the legality of what was done.

TeleSystems is aware of the difficulty inherent in seeking to overturn action which purportedly is grounded on an agency's expert judgment in a complex regulatory matter. The fact remains, however, that this appellant proceeded in good faith for a number of years to obtain all necessary authorizations to construct, and did construct, a proper and lawful business activity. Without seeking to weigh the resulting hardship to appellant or to give it an opportunity in a hearing to develop the facts or the relative equities involved, the Commission has virtually destroyed that business. TeleSystems submits that no counter-arguments have been submitted on behalf of the Commission which conceivably could justify such action. Appellant renews its prayer that the action of the Federal Communications Commission here under review be reversed and set aside.

Respectfully submitted,

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March 29, 1967

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,387

TELESYSTEMS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

PHILADELPHIA TELEVISION BROADCASTING CO.,
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
WESTINGHOUSE BROADCASTING COMPANY, INC.,
Intervenors.

ON APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF QUESTIONS PRESENTED

I. The questions presented, as agreed to by the parties in a stipulation approved by this Court on September 23, 1966, are:

1. Whether the CATV rules of the Federal Communications Commission in their application to appellant constitute the regulation of television reception, and if so, whether such regulation exceeds the statutory authority of the Commission.

2. Whether the adoption of certain new CATV rules by the Federal Communications Commission and their application to appellant constitute a violation of Section 326 of the Communications Act, and an unlawful abridgment of appellant's right of freedom of speech as guaranteed by the First Amendment to the United States Constitution.

3. Whether the Federal Communications Commission's adoption on March 4, 1966, of new CATV rules to be immediately effective was violative of Section 4(c) of the Administrative Procedure Act.*/

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*/ In addition, the prehearing stipulation included issues as to whether appellant's CATV system was in intrastate commerce and thus outside the scope of the Commission's authority; and whether the CATV rules, as adopted, were arbitrary in requiring evidentiary hearings and in assigning the burden of proof therein to the CATV systems. The former question has been expressly abandoned (App. Br. p. II); and the latter, not having been briefed, must also be assumed to have been waived.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b)(7) of the Communications Act of 1934, as amended, 47 U.S.C. Section 402(b)(7). It seeks review of a decision of the Commission released July 28, 1966, (R. 114-124) which found that appellant's commencement of operation of its community antenna television (CATV) system in Springfield Township, Pennsylvania, was in violation of Section 74.1105 of the Commission's Rules, and that appellant's importation into that community by CATV of the signals

of television stations in New York City was in violation of Section 74.1107 of the Rules.[1/] Appellant was ordered to cease and desist from such violations.

It is felt that a more complete statement of the case than that contained in appellant's brief would be useful to the Court, and accordingly the following counterstatement is submitted. We shall first set forth the considerations which led to the adoption of Sections 74.1105 and 74.1107 and then turn to the cease and desist proceeding which gave rise to this appeal.

I. The Rulemaking Proceeding.

Originally, community antenna television systems (commonly called CATV[2/] systems) came into being to bring television to areas not reached by any television station and to afford multiple services

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1/ The text of Sections 74.1105 and 74.1107 are set forth in pertinent part at pp. 4-6 of appellant's brief.

2/ The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." Section 74.1101(a).

to areas not already having them. Distance from originating stations, intervening obstacles such as mountains or other high elevations, and seasonal or other changes in atmospheric conditions can impair or make impossible good television reception by ordinary means. Where such conditions prevail, master antennas have been erected at suitable locations, usually on a mountain or other high elevation where the reception of the signals of the desired stations is strong. The signals are transmitted to the community by cable or radio hops, amplified to insure delivery of signals of acceptable strength, and distributed by cable to the homes of individual customers within the community. At the home, the incoming cable is attached directly to the receiving connection of a regular television set.[3/]

While the early CATV systems customarily offered programs on three channels, the newer systems generally have a twelve channel capacity, and a twenty channel capacity is being projected for systems in the near future. The latest estimates place the number of systems in existence at over 1,600. The distances over which signals are taken has also greatly increased, to as much as 600 miles, Second Report and Order on the Distribution of Television Broadcast Signals by Community Antenna Television Systems, 2 F.C.C. 2d 725, 771-772.

3/ This Court is familiar with some of the regulatory problems created by the development of such systems. Booth American Company v. Federal Communications Commission, Case No. 20,367, decided January 26, 1967; Philadelphia Television Broadcasting Co. v. Federal Communications Commission, 123 U.S. App. D.C. 298, 359 F.2d 282 (1966); Idaho Microwave, Inc., v. Federal Communications

(contd.)

Along with this general growth of CATVs, there has been a gradual change in the focus of attention of community antenna operators. While franchises were initially obtained only in underserved communities of small or modest size, CATV franchises are now being obtained in the largest cities, Second Report and Order, 2 F.C.C. 2d at 771-772. Because of the rapid and uncontrolled growth of these systems, the Commission was concerned whether CATV service, which is available only to those persons who are willing and able to pay and who are within reach of the cable facilities, might not adversely affect the maintenance and development of the basic "free" system of television broadcasting, particularly the development of UHF stations, through the loss of audience and advertising which a CATV can cause.

Thus, on April 23, 1965, the Commission released a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971, 1 F.C.C. 2d 453, proposing to assert jurisdiction over all CATV systems, whether or not they use microwave radio to distribute the signals they pick up. After considering the voluminous comments filed in response to this Notice, the Commission announced on February 15, 1966 that it had agreed on a program for the regulation of CATV systems. It described in some detail the content of the new rules and expressly stated that the provision relating to the importation of distant signals (Section 74.1107) would apply to all CATV operations commenced after that date.

3/ (contd.) 122 U.S. App. D.C. 253, 352, F.2d 729 (1965); Citizens TV Protest Committee v. Federal Communications Commission, 121 U.S. App. D.C. 50, 348 F.2d 56 (1965); Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 93, 321 F.2d 359, cert. denied 375 U.S. 951 (1963).

On March 8, 1966, the text of the new rules was released together with the Commission's Second Report and Order, supra, setting forth the basis for the Commission's assertion of jurisidction and describing the purpose of the new rules and the reasons underlying their adoption. Among other things, the Commission noted that Congress, in the 1962 all-channel receiver legislation[4/] had made the judgment that the widest possible development of UHF is the best way of achieving an adequate national television service, including both commercial and educational systems, 2 F.C.C. 2d at 770. It believed that since UHF development was already proceeding in at least 163 communities or areas - most of which were located within the top 100 televisions markets - any halt or curtailment of the growth of UHF development caused by the importation of signals by CATV from other areas into these markets would be particularly significant. The Commission determined that there should be full exploration, in an evidentiary hearing, of the impact of any new proposed CATV system bringing signals from beyond the Grade B contour of the original station into any Grade A service area of any station in a community in one of the top one hundred markets.[5/]

4/ P.L. 529, approved July 10, 1962, 76 Stat 150, 47 U.S.C. 303(s).

5/ A Grade B contour is the imaginary line along which a good picture may be expected for 90 per cent of the time at the best 50 per cent of the locations The Grade A contour defines the area at the perimeter of which a good signal is received for 90 per cent of the time at the best 70 per cent of locations. See Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, at 215-216 n. 12, 225 F.2d 511, at 515-516 n. 12 (1955).

Section 74.1107 of the Rules was adopted to carry out this determination. The rule provides in essence that, absent Commission approval, no CATV system operating within the 100 largest television markets can bring into the market the signals of outside television stations where the result is to extend the signals of such stations beyond their predicted Grade B contour The rule prescribes procedures whereby Commission approval may be obtained In addition, to avoid disruption of existing service, systems in operation as of February 15, 1966, the date on which public notice was given that new rules would soon be issued, are allowed to continue their existing operations, 2 F.C.C. 2d at 784-785.

At the same time, the Commission determined that the public interest would be served by making this provision effective immediately. The Commission pointed out that since the rule is applicable to all systems which commence operation after February 15, 1966, no purpose would be served by delaying its enforcement until thirty days after its publication in the Federal Register. In the interim, the Commission found, affected systems might well add a significant number of subscribers, thus increasing the prospect of disruption and inconvenience if a discontinuance of the service is required. "Good cause therefore exists," the Commission stated, "to make the rules as to the major market procedure effective upon publication," 2 F.C.C. 2d at 784-785.

On January 19, 1967, the Commission denied reconsideration in all respects material to this appeal, 6 F.C.C. 2d 309. In

addition to rejecting arguments as to the reasonableness of the rules and its authority to promulgate them, the Commission considered and denied claims that its rules imposed unconstitutional restrictions on freedom of speech. Its Opinion pointed out that regulation of radio transmissions, if consistent with the public interest standard of the Communications Act, does not constitute a violation of First Amendment freedoms, National Broadcasting Co. v. United States, 319 U.S. 190 (1943); Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963), cert. denied 375 U.S. 951. With regard to the importation of distant signals, the Commission stated that the right of free speech does not include "the right of a party subject to the Act's jurisdiction (here an interstate communicator by wire) to extend the service area of a television station beyond the area authorized by the Commission, in a manner inconsistent with the public interest," 6 F.C.C. 2d at 311.

II. The Cease and Desist Proceeding

TeleSystems Corporation is the owner and operator of a CATV system located in Springfield Township, Pennsylvania. The system makes available to its subscribers for a fee the signals it receives off-the-air from eleven television stations as follows: New York City stations WNEW-TV, WOR-TV and WPIX; Philadelphia stations KYW-TV, WFIL-TV, WCAU-TV, WPHL-TV, WIBF-TV and WUHY-TV; WHYY-TV of Wilmington, Delaware; and WKBS of Burlington, New Jersey.

On May 27, 1966, the Commission released an Order (R. 7-10), directing TeleSystems to show cause why a cease and desist order should not be issued against further operation of its CATV system in Springfield Township, Pennsylvania, in violation of the CATV regulations. Specifically, the order charged TeleSystems with extending, without prior Commission authorization, the signals of stations WNEW-TV, WOR-TV and WPIX, all of New York City, beyond their Grade B contours, thus contravening Section 74.1107 of the rules; and commencing CATV operations after March 17, 1966, without having given the notification to television stations required in Section 74.1105 of the rules.

Following an evidentiary hearing, the Commission on July 28, 1966, released its decision (R. 114-124). It found that TeleSystems owns and operates a CATV system as defined by Section 74.1101(a) of the rules; that this CATV system operates within the Grade A contours of the Philadelphia television stations; that Philadelphia is ranked as the 4th largest television market by the American Research Bureau (ARB); that TeleSystems' CATV system commenced operation after February 15, 1966; that since May 18, 1966, TeleSystems' CATV system has been extending the signals of three New York City television stations beyond their Grade B contours without requesting and obtaining the approval needed under Section 74.1107; and that TeleSystems did not give prior notice of the commencement of its CATV service to the licensees and permittees of television stations within whose predicted Grade B contours the CATV

system is operating as required by Section 74.1105. On the basis of the foregoing, the Commission concluded that TeleSystems' CATV system was operating in violation of Sections 74.1105 and 74.1107 of the rules and that the public interest required the issuance of an order pursuant to 47 U.S.C. Section 312(b) directing TeleSystems to cease and desist promptly from carrying New York City stations on its CATV system and to cease operation of its entire CATV system until 30 days after notice is given pursuant to Section 74.1105.[6/]

TeleSystems filed this appeal on August 9, 1966.

6/ The Commission's decision contained a conditional 14-day stay of its order in the event TeleSystems decided to seek a judicial stay. TeleSystems has sought no stay. It did, however, comply with the 30 day notice requirement of 74.1105, and is now free to operate its system minus only the New York signals. Thus the Commission's decision does not cause the forfeiture clauses in TeleSystems' franchises to become operative (Br. 3).

SUMMARY OF ARGUMENT

I

The Commission has exercised limited jurisdiction over CATV systems to insure that they will be of value as supplements to the television broadcast service whose signals they use, without destroying the basic allocation of "free" television service. This action was within the jurisdiction conferred upon the Commission by Congress. CATV systems are engaged in communication by wire in interstate commerce, to which the Communications Act is specifically made applicable. They are also a practical extension of the service of television stations, actively distributing television signals. Therefore, the Commission could make rules to prevent the growth of CATV systems from frustrating the Commission's duty to provide a fair, efficient and equitable allocation of television service to the various communities of the United States. The CATV rules do not establish a licensing scheme like that applicable to radio stations. The fact that CATV systems are not so licensed and are also not classified as common carriers does not leave the Commission without authority to regulate them. Such a rigid dichotomy must be rejected where, as here, an operation is an interstate communication comprehended by the statute and it raises problems the resolution of which are specifically committed to the Commission by the statute.

II

The Commission's rule making proceeding complied with the requirements of Section 3(a)(3) and 4(c) of the Administrative Procedure Act. In any event, TeleSystems was not prejudiced by the provision that the rules were to be applicable to systems commencing operation after February 15, 1966 (rather than as of the publication date of March 17, 1966) or by the Commission's action making the rules effective upon their publication (rather than thirty days thereafter) because TeleSystems did not commence operation of its system until May 18, 1966. As to the merits, the distant signal rule has no retroactive effect. Only those systems operating in violation of the rules after their publication are subject to sanctions. The necessity for the use of a cut-off date for exemption was amply justified. The Commission also made a sufficient good cause finding to warrant making the rules effective upon publication rather than thirty days thereafter.

III

The Commission's rules do not violate the constitutional protection of free speech. The distant signal rule merely requires that the operator of a CATV system obtain the Commission's permission before it extends the signal of a television station beyond its normal service. As such, the rules constitute a reasonable regulation of the use by CATV systems of radio signals.

They do not affect the right of petitioners to originate program material. The narrow regulation involved does not impair any protected right of free speech.

ARGUMENT

I. THE COMMUNICATIONS ACT OF 1934 GIVES THE FEDERAL COMMUNICATIONS COMMISSION THE AUTHORITY IT HAS ASSERTED OVER COMMUNITY ANTENNA TELEVISION SYSTEMS.

The Commission 's objective in regulating CATV systems is to insure that the rapidly growing CATV industry develops in a manner that is compatible with a healthy television broadcast system. No attempt has been made to limit the origination or distribution by CATVs of their own programming, no licensing system is established, and no regulation is imposed on fees charged. The rules regulate only the use made of television broadcast signals, limiting that use in order to maintain both a diversified local "free" television service and a supplementary CATV service as components of a nationwide television system. Their basic purpose is to make sure that CATV service will not destroy the basic television service which gives it its substance.

In the rule making proceeding which led to the adoption of the CATV rules, the jurisdictional question was carefully considered. The Notice of Inquiry and Notice of Proposed Rule Making, 1 F.C.C. 2d 453, requested the views of all interested persons and submitted as the basis for comment a comprehensive memorandum on jurisdiction, 1 F.C.C. 2d at 478-482. The comments submitted on this point were discussed in some detail in the Report and Order adopting the rules, 2 F.C.C. 2d at 728-745. The Commission, however, adhered to the position taken in the jurisdictional memorandum and determined that the exercise of its authority was required in the public interest. For a full statement of the basis for the Commission's assertion of jurisdiction we respectfully refer the

Court to that portion of the Second Report and Order and to the jurisdictional memorandum adopted therewith. (The text of the memorandum is appended to our brief as Appendix A.) Our argument in this brief is directed primarily to TeleSystems' contentions that the CATV rules represent (1) an improper attempt to regulate television reception and (2) the imposition of a licensing system unauthorized by statute.

A. Appellant's CATV System Is Engaged In Interstate Communication By Wire Or Radio And Not Merely In The Reception Of Television Signals.

In the Communications Act of 1934, Congress provided a comprehensive scheme for the regulation of interstate and foreign commerce in communication by wire and radio. The Federal Communications Commission was created in order to centralize authority in a single agency to carry out the Congressional purpose, Section 1, 47 U.S.C. §151.[7/] The provisions of the Act were made applicable "to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, * * *" Section 2(a), 47 U.S.C. §152(a) "Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors," Federal Communications Commission

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7/ The text of those portions of the Communications Act on which we rely is set forth as Appendix B to this Brief.

v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

Under Section 3(a) of the Act, 47 U.S.C. §153(a), wire communication is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, * * * including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." In light of the service offered by TeleSystems and other such systems, it is clear that CATVs are engaged in communication by wire within the meaning of the Act. 8/

The Commission has authority under Section 303(h) of the Act, 47 U.S.C. §303(h), to "establish areas or zones to be served by any station," and it is commanded by Section 307(b), 47 U.S.C. §307(b), to "make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." It has been further directed to promote the development of UHF stations, in order to achieve

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8/ The question of whether CATVs are interstate in character is specifically not being argued by TeleSystems (Br. p. I, fn.). As to this question, however, see Idaho Microwave, Inc. v. Federal Communications Commission, 122 US. App. D.C. 253, 352 F.2d 729 (1965); California Interstate Telephone Co. v. Federal Communications Commission, 117 U.S. App. D.C. 255, 328 F.2d 556 (1964); Ward v. Northern Ohio Telephone Co., 300 F. 2d 816 (C.A. 6, 1962), cert. denied 371 U.S. 820.

an effective nationwide television system. See Section 303(s), 47 U.S.C. §303(s).[9/] The Commission also has broad authority to perform all acts necessary to the execution of its functions, Sections 4(i), 303(r), 47 U.S.C. §§154(i), 303(r).

As this Court has already held, it would be unrealistic to ignore the fact that a community antenna system is in practical effect (as well as in legal contemplation) a part of the transmission of the television signal to the public, Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, 217, 225 F.2d 511, 517 (1955). This being so, and in recognition of the Commission's "comprehensive powers to promote and realize the vast potentialities of radio," National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943), it follows that the Commission has authority to prescribe by rule the conditions under which a television signal may be extended through the medium of a community antenna system, in order to prevent frustration of the Congressional scheme of television

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9/ This section authorizes the Commission to require all television receivers shipped in interstate commerce to be capable of receiving UHF signals. The major purpose of the law was to promote the development of multiple television services nation-wide through the use of locally situated UHF outlets. Enacted in 1962, it represents clear Congressional approval of the policy decisions underlying the Table of Allocations, 47 CFR 73.606, adopted by the Commission to fulfill the mandate of Section 307(b). See H. Rept. No. 1559, 87th Cong., 2d, p. 2-6 (1962), S Rept. No. 1526, 87th Cong. 2d Sess., p. 2-5. Its relation to the CATV policy adopted by the Commission is set forth in the Notice and Second Report, 1 F.C.C. 2d at 468-71, 2 F.C.C. 2d at 770-71.

regulation, in particular the mandate of Sections 307(b) and 303(s).

In view of these considerations, the Commission concluded, 2 F.C.C. 2d at 730:

> * * * CATV systems differ from most other businesses in that they are themselves engaged in "interstate communication by wire," a business to which the act's provisions are expressly applicable (secs. 2(a), 3(a)). Moreover, they physically intercept and extend television signals, and thus have a uniquely close relationships to the regulatory scheme embodied in sections 303(h) and 307(b). We are not powerless to prevent frustration of our action under those sections by persons subject to the act merely because the licensing provisions of the statute are inapplicable to them. [Footnote omitted.]

TeleSystems argues that the Commission's view of CATVs as a link in the transmission of television signals to the public is fundamentally wrong and that CATVs, instead, are merely devices for the reception of signals, differing in no significant way from ordinary home antennas But this argument ignores the fact that CATVs are more than passive receivers; they are in fact distribution systems whereby signals may be carried hundreds of miles beyond their point of origin and delivered to subscribers far beyond the normal range or service area of the stations involved.

The argument that CATV systems are simply "master antennas" was considered by the Commission in the CATV rule making and found to be at odds with any realistic assessment of the actual functions of a CATV system Thus the Commission stated, 2 F.C.C. 2d 780:

> A CATV system which proposes to employ microwave to bring in signals 400 or 500 miles away is not a master TV antenna service. It cannot seriously be argued that CATV proposals to bring the New York independents to Dayton or the Los Angeles independents to Dallas-Fort Worth represent master TV antenna arrangements. Nor, whatever its validity in many instances, can the argument appropriately be made when a very tall antenna is employed on a high elevation, with many miles of cable and electronic gaar to distribute the distant signals.[19]

This determination has "warrant in the record" -- indeed it has not been directly challenged by TeleSystems -- and should, we think, be regarded as controlling, N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944); Gray v. Powell, 314 U.S. 402 (1941).

The notion that CATVs are simply a form of television reception has also been emphatically rejected by the Courts. Thus in United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (D.C.S.D.N.Y. 1966), an action for infringement of copyrights, the Court stated:

10/ From the foregoing it is clear that appellant's analogy between a CATV and a home receiving antenna is strained,to say the least On this point, the Court in Fortnightly stated at 197, 198,:

> The basic function of defendant's complex distribution systems is to receive, reproduce, transmit and perform television programs over an elaborate communication network whereas the home set serves its purpose when it receives the program. The home set does not create new carriers for transmission whereas the heart of defendant's systems is its head end which contains complex equipment for the purpose of adding energy to and processing and preparing the signals for transmission through coaxial cable, all in a manner wholly dissimilar to that of the connecting line between the ordinary homeowner's antenna and the home receiver. Hundreds of amplifiers are required to transmit the signals to defendant's subscribers. Without such equipment defendant's systems could not work.

(contd.)

> The term "community antenna," as used by defendant for self-description, is a misnomer and reflects a fundamental misconception. Defendant's two systems are not "community" ventures. They are large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs, including plaintiff's copyrighted motion pictures Nor are defendant's operations simply that of passive "antennas" used only to receive telecasts. In fact, defendant's two systems, among other processes, receive, electronically reproduce and amplify, relay, transmit and distribute television programs -- operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas. 255 F. Supp. at 180. See also

See also pp. 190-195.[11/]

TeleSystem's CATV is in all material respects technically similar to that considered by the Court in United Artists. Located in a suburb of Philadelphia, it receives not only the signals of area stations but also brings in beyond their normal range the signals of three New York stations. These in turn are distributed to its subscribers through an elaborate system which includes antennae, head-end equipment, a head-end building,

10/ (contd.) See also Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Washington, D. C. (1965), pp. 23-27; Regulation of Community Antenna Television, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Serial No. 89-34, pp. 17-28 (1966).

11/ Technically, appellant's CATV does not utilize microwave links. Like the latter category of systems to which the Commission referred, it depends on a favorable location and "miles of cable and electronic gear" to distribute the signals it provides to its customers. See infra.

main trunk line and individual household connections (R. 36-37).

In view of the foregoing, TeleSystems' argument that Sections 303(h) and 307(b) do not confer jurisdiction over television receivers but relate instead to the fair distribution of services is beside the point. Since, as we have shown, CATVs are a link in the chain transmitting a signal between its point of origin and its reception by the viewing public and since they are engaged in interstate communications within the meaning of Section 3 of the Act, the Commission could properly exercise its rule making power to carry out the Congressional mandate embodied on those sections.

B. <u>The Commission May Properly Adopt Regulations Applicable to CATV Systems Even Though They Are Neither Radio Stations Nor Common Carriers</u>.

TeleSystems also argues that the Commission has two principal and separate functions -- to regulate interstate common carriers and to license radio stations -- and that since a CATV system is neither a common carrier nor a radio station, its activities are beyond the Commission's concern under the statute. Additionally, it contends that the Commission's CATV rules constitute in fact if not in name a licensing scheme and thus constitute an exercise of authority beyond the scope of the Commission's statutory jurisdiction.

The CATV rules do not purport to establish a licensing structure analogous in any sense to that which applies to radio stations pursuant to Title III of the Communications Act. There is

no attempt to pass on the qualifications of prospective CATV operators or to assess the adequacy of their proposal in any legal, financial or technical sense.[12] As noted above, the Commission's only objective is to assure that the services provided by the CATV will be consistent with the establishment and healthy maintenance of television broadcast service in the area, a matter clearly committed to Commission concern under the terms of the Communications Act. If, as we have urged, the Commission may regulate the activities of those engaged in interstate communication by wire to the extent necessary to achieve this goal, it makes no difference whether its actions are termed "licensing" or something else. Thus, even assuming that the Commission's rules constitute licensing in the broad sense of the term,[13] its rules are not for that reason invalid.

Contrary to appellant's assertion, the Communications Act covers not merely interstate common carriers and those radiating radio signals in the spectrum, but rather "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States," and specifically "all persons engaged within the United States in such communicatinn or

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12/ Cf. 47 U.S.C. 308, 309.

13/ The Administrative Procedures Act defines a license as an "agency permit, certificate, approval ... or other form of permission," 5 U.S.C. 551(e).

such transmission of energy by radio * * *," Section 2(a), 47 U.S.C. §152(a). Nowhere in the statute has Congress stated that by "interstate communication by wire" it meant only interstate communication by wire "by a common carrier," and there is no reason to import such language into an Act designed to grant to a newly established Commission not only a centralization of authority theretofore granted to several agencies but also "granting additional authority with respect to interstate and foreign commerce in wire and radio communication," Section 1, 47 U.S.C. §151. If Congress had meant only that wire communication engaged in by common carriers, it would not have referred to "all" interstate communications.

The dichotomy of separate precise common carrier and radio licensing functions urged by TeleSystems is not only a concept at odds with the express language of a statute designed to cover all forms of interstate communication, but is one which this Court has already indicated is not consistent with the statute. Thus, in Philadelphia Television Broadcasting Co. v. Federal Communications Commission, 123 U.S. App. D.C. 298, 300, 359 F.2d 282, 284 (1966), in sustaining the Commission's decision that CATV systems are not common carriers, the Court stated:

> * * * Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.
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> * * * * *

> Its [the Commission's] holding that CATV systems are not common carriers thus comes before us in a context of regulation of the CATV systems under different provisions of the Communications Act. In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in chossing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective. It is the FCC's position that regulating CATV systems as adjuncts of the nation's broadcasting system is a more appropriate avenue for Commission action than the wide range of regulation implicit in the common carrier treatment urged by petitioners. This seems to us a rational and hence permissible choice by the agency. [Footnote omitted.]

While the Court stated that it was not ruling on the validity of the Commission's jurisdiction,[14/] its opinion seems clearly to reject the rigid dichotomy in the statutory scheme that TeleSystems seeks to advance.

This Court has sustained the Commission's decision to examine the impact of CATV operations upon television broadcast service in connection with the grant of a common carrier radio license to serve a CATV system, and in doing so it rejected the argument that considering the competitive consequences of the grant was to bring "broadcast" regulation into the common carrier field. Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 93, 96, 321 F.2d 359, 362 (1963),

14/ The decision states in this connection, however, that "certainly the Commission's assertion of jurisdiction over CATV systems, is substantial enough to serve as a basis for declining to regulate them as common carriers." Id.

cert. den. 375 U.S. 951. The Court stated, "It [the Commission] cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field. In both fields, it must 'make available, so far as possible, to all the people of the United States,' adequate and efficient service. See Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. §151 (1958)."[15/]

The Commission's authority flows not merely from the general relationship of CATV operations to the efficient use of the television portion of the spectrum, but also from the fact that the CATV system makes use of a radio signal which it picks up and carries beyond its normal range. The Commission clearly has the power to prevent frustration of its duty to prescribe the areas to be served by television stations.

The case of American Trucking Association v. United States, 344 U.S. 298 (1953), is particularly pertinent. In that case the Interstate Commerce Commission adopted rules governing the use by regulated motor carriers of leased and interchanged equipment. The purpose of the rules, as the Court stated, 344 U.S. at 310, "is

15/ It is significant that this Court, dealing with common carrier regulation in the Carter Mountain case, and the Supreme Court, dealing with broadcast regulation in National Broadcasting Co. v. United States, 319 U.S. 190, 214 (1943), both referred to Section 1 of the Act, which states the Congressional "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges; * * *" This demonstrates that the Act does not perpetuate narrow and disconnected regulatory concepts, but rather creates a unified mode of regulating all interstate communications under an empirical public interest test.

to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system." Although the leasing practices proscribed by the new rules were nowhere specifically committed to the agency's jurisdiction by the statute, and the leased equipment was otherwise exempt from regulation, the Court sustained the regulation on the basis of the grant of general rule making power necessary for enforcement of the Act's provisions, recognizing that the specific powers granted would be meaningless without the correlative power to prevent frustration of the Act's purposes. It stated, 344 U.S. at 311:

> So the rules in question are aimed at conditions which may directly frustrate the success of the regulation undertaken by Congress. Included in the Act as a duty of the Commission is that "[t]o administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration." §204(a)(6). And this necessary rule-making power, coterminous with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation," regulation of which is vested in the Commission by §202(a). See also §203(a)(19).

The situation now before this Court is at least as strong for affirmance as that before the Supreme Court in American Trucking Associations.[16/] An operation which is unquestionably comprehended by the statute as an interstate communication has raised the spectre of frustration of enforcement of the Act, and so may be dealt with under the broad rule making powers conferred by Congress on the Commission.

In sum, the communications field is one wherein Congress "gave the Commission not niggardly but expansive powers," and defined "broad areas for regulation" because it did not wish to "frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency," National Broadcasting Co. v. United States, 319 U.S. 190, 219, 220 (1943). Since CATV systems extend the service area of television stations (a matter committed to Commission concern under Section 303(h)), are interstate commerce communications coming within the Act's provisions (Sections

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16/ This is to be contrasted with Regents of Georgia v. Carroll, 338 U.S. 586 (1950), where the Court held that the Commission's action in not renewing a station license because of a contract between the licensee and a third person did not affect the rights of the parties under the contract in a state suit. The other party to the contract in that case was not a person engaged in interstate communication by wire or radio whereas TeleSystems is.

2(a), 3(a) and (e)), and have the capacity to frustrate the fair and efficient allocation of television service which the Commission is commanded by Section 307(b) and 303(s) to achieve, the Commission properly invoked the authority given it by Sections 4(i) and 303(r) to make rules and regulations not inconsistent with the Act, to carry out its functions and the provisions of the Act. The Commission's CATV rules are consistent with the Act and necessary to its enforcement. For the reasons set forth, we urge that they have been adopted within the confines of the authority granted by Congress.

II. SECTIONS 74.1105 and 74.1107 OF THE COMMISSION'S RULES WERE EFFECTUATED IN FULL COMPLIANCE WITH THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT.

Appellant presents a two-fold argument that Sections 74.1105 and 74.1107 of the Commission's Rules were effectuated in violation of Sections 3(a)(3) and 4(c) of the Administrative Procedure Act, U.S.C. 552(a)(3) and 553(c). As the first prong of its argument, TeleSystems alleges since Section 74.1107 was not published until March 17, 1966, its prospective application from February 15, 1966, constitutes an unlawful retroactive application of the Rule. Second, TeleSystems argues that the effectuation of both Sections74.1105 and 74.1107 upon publication is contrary to the 30-day notice requirement of Section 4(c) of the Administrative Procedure Act, and that the Commission's recitation of "good cause" therefore is inadequate.

As a threshold matter we point out that neither the provision wherein the rules were to be applicable to systems in

operation after February 15 (rather than as of the effective date of the rules) nor the Commission's action making its rules effective immediately (rather than thirty days after publication) had any prejudicial affect on TeleSystems. Its system did not begin until May 18, 1966, nearly two months after publication of the rules in the Federal Register. The argument (Br. p. 30) that it could have been in operation shortly after February 15, 1966, and would then have been entitled to certain procedural rights is both irrelevant and erroneous. Whether TeleSystems was prejudiced hinges on the facts of the case rather than on hypothetical alternatives. But even if TeleSystems had begun earlier it would have been entitled to exactly the same procedural rights it was afforded here, a show cause hearing as provided by 47 U.S.C. 312 (b)(c) and (d) of the Act. Cf. Booth American Corp. v. Federal Communications Commission __ U.S. App. D.C. , __ F.2d ___, case no. 20,367, decided January 26, 1967. While we recognize that rules may be judicially examined when applied in subsequent licensing actions, Functional Music, Inc. v. Federal Communications Commission, 107 U.S. App. D. C. 34, 274 F.2d 543 (1958), cert. den. 361 U.S. 813, we do not think it is open to appellant now to challenge procedural provisions of this kind that are wholly unrelated to the Commission action under review. But in any event we think it clear that appellant's arguments are without merit.

A. Section 74.1107, The Commission's New Distant Signal Rule, Has No Retroactive Effect; The Fact That The Rule "Grandfathers" Operations Commenced Before February 15, 1966, Has No Bearing On The Question of Retroactivity.

Section 74.1107(d) specifies that the provisions of the rule "shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date." This technique of exemption or "grandfathering" of operations in existence at a specified date is a familiar one. In United States v. Maher, 307 U.S. 148 (1939), the Supreme Court referred to a typical "grandfather" clause, section 206 of the Motor Carrier Act of 1935, 49 U.S.C. 306, and stated: "By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established," 307 U.S. 153.

Similar considerations influenced the Commission, after careful consideration, to extend an exemption to signals being supplied by CATV systems on or before February 15, 1966, 2 F.C.C. 2d at 784-785. Many of those filing comments in the rule making proceeding had urged that no "grandfather" clause be adopted at all; others had suggested April 23, 1965, the date the notice of rule making was issued, as the cut-off

date. The Commission's resolution of this matter was succinctly explained in its Memorandum Opinion and Order denying petitions for stay of the effective dates of the Second Report and Order, 3 F.C.C. 2d 816, 820 (1966):

> The difficulty with such approaches, in our judgment, was the very substantial disruption to the CATV viewing public which could result from requiring a cessation of distant signal service in major markets significantly after CATV service had been initiated. Some appropriate form of grandfathering was therefore in order. Here again we might have chosen a date such as January 1, 1966, on the ground that there might not be too much disruption since systems which commenced operation after that date would not ordinarily have a great number of subscribers. Instead, we determined to take an approach even more liberal to the CATV industry, and adopted the February 15 grandfather date -- the date on which the Commission reached informal agreement on its general policy in this area. There was widespread interest in our discussion, both in Congress and in the industries involved, and we therefore publicly announced the overall course we had determined upon.

The Commission then turned to the contention that, at the earliest, March 17, 1966, the date the new CATV Rules became effective, should be determinative as to the "grandfathering" question. It found "sound reasons militating against such a course." Stating that CATV growth has been "explosive," a finding amply documented from a nationwide standpoint, the Commission found that "even a postponement of several weeks might have irrevocably changed the existing situation to a substantial degree." Its opinion continues, Id. at 821-822:

Of particular concern in our decision to adopt the February 15 grandfathering date is the tendency of some business entrepreneurs to make extraordinatry efforts to commence operations before an announced deferred deadline which will confer grandfather rights. If the effective date of section 74.1107 had been postponed until 30 days after publication and the grandfathering line had been drawn either at that point or at the publication date, it is likely that many of the 1,207 franchised systems not yet in operation would have made extraordinary efforts to commence service to a token number of subscribers before the deadline, in order to be in a possible position to expand throughout the entire community without undergoing the hearing which we have found required by the public interest. It is reported, for example, in the April 4, 1966, edition of Cable Television Review (p. 3) that in Toledo, petitioner Buckeye, who is challenging the validity of the February 15 grandfathering date, "raced the clock prior to the March 16 FCC report and order deadline, and was delivering signals to 52 homes 8 hours before the 17th" (opposition of Storer Broadcasting Co. to petition for stay, p. 3).

* * *

In short, we simply do not believe that in a situation of rapid change we are precluded from taking immediate action to stay, pending hearing, the commencement of new operations which could be seriously detrimental to the public interest and which by the act of coming into being might preclude effective remedial action by the Commission -- at least without substantial disruption to the public. Sound public interest considerations therefore existed for drawing the grandfathering line at February 15. We stress again that selection of this date was less stringent action than an earlier cutoff, and was designed to minimize any disruption in existing service to the CATV segment of the viewing public, while at the same time affording necessary protection against possible irreparable injury to the public interest from a pell-mell scramble for commencement of new operations in major markets during a hiatus.

In light of the foregoing, we believe that ample justification was shown for the selection of the February 15, cut-off point. The Commission concluded that even a matter of several weeks in assigning a date governing exemption from the rules "might have irrevocably changed the existing situation."

Appellant's attempt to stigmatize the exemptive provision of Section 74.1107 by terming it "retroactive" is plainly without merit. The rule itself became effective as of March 17, 1966, and only those systems which operate in violation of its terms after that date are subject to sanctions. It does not purport to make illegal any CATV operation engaged in prior to that date. Hence no retroactivity is involved.[17/] The fact that the Commission selected a cut-off date for exemption that preceded the effective date of the rules in no way alters this fact. The significance of the February 15 date is that it determines those systems to which the rule will apply; but conduct in violation of the rule is only that which occurs subsequent to the March 17, 1966, effective date.

17/ While Section 74.1107 is not a retroactive rule, it should be noted that nothing in the Administrative Procedure Act precludes the issuance of retroactive rules when otherwise legal and accompanied by a finding of good cause. And see S.E.C. v. Chenery Corp., 332 U.S. 194, 203 (1947).

B. The Commission Made A Sufficient Finding Of Good Cause to Warrant An Exception To The 30-Day Notice Requirement Of Section 4(c) Of The Administrative Procedure Act.

There is no merit to appellant's contention (Br. 32-37) that "the Commission failed to make a sufficient showing of good cause" for making the CATV rules effective as of their date of publication rather than thirty days thereafter. By its terms, Section 4(c) of the Administrative Procedure Act establishes a discretionary exception to the general rule that publication must be made at least thirty days prior to the effective date. The same considerations which prompted the Commission to establish the February 15 grandfather date militated in favor of an immediate effective date. Additionally, the Commission stated, 2 F.C.C. 2d at 784-785:

> Since we shall not "grandfather" systems coming into operation after February 15, 1966, the effectiveness of our action, practically speaking, is geared to that date. We could follow normal procedure and wait until 30 days after publication in the Federal Register to proceed against systems commencing operation after February 15, 1966, in the top 100 markets. But we do not believe that this hiatus would serve any useful purpose or the public interest. For, in the interval, a system might commence operation after the February 15 date and make "drops" to a significant number of subscribers, all of whose CATV service could be ended when the Commission instituted cease-and-desist proceedings as to the CATV operation. In the circumstances here, where "grandfathering" is pegged to the Febauary 15 date we think that orderly procedure and the desirability of avoiding disruption as much as possible call for immediate Commission action, rather than the Commission waiting passively on the sidelines for the 30-day period to expire. Good cause therefore

> exists to make the rules as to the major market procedure effective upon publication, so that we may proceed forthwith against any system operating in contravention of those rules.[66]

[66] * * * We shall also make effective upon publication the procedural provisions (secs. 74.1105, 74.1109) which relate to sec. 74.1107.

TeleSystems has failed to show that reliance on these considerations constituted an abuse of discretion.

TeleSystems argues (Br. 33) that the legislative history of Section 4(c) reveals the intention of Congress "that persons affected by new agency rules be given a reasonable chance to order their affairs before such rules become effective, and that the mandatory delay be dispensed with only upon a clear finding of an urgent situation demanding that the delay be avoided." We submit that the Commission's finding of good cause spells out the requisite "urgent situation." Specifically, the Commission found that there were substantial public interest questions as to the impact of CATV on UHF television, that CATV was expanding with great rapidity, that a rollback of CATV would cause great disruption and, therefore, that time was of the essence.

Further, TeleSystems was provided more than a "reasonable chance to order [its] affairs." As early as April 1965, the Commission had given notice that it proposed to assert jurisdiction over all CATV systems, whether or not they use microwave radio to distribute the signals they pick up, Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15,971, 1 F.C.C. 2d 453.

Additionally, the substance of the rules as finally adopted was announced by the Commission on February 15, 1966, 6 Pike & Fischer, RR 2d 1637.

In sum, in our view it is clear that the rapid expansion of CATV systems, the desirability of prompt action to minimize disruption of service, and considerations of administrative efficiency justified the Commission in making the CATV rules effective immediately upon their publication rather than thirty days thereafter.

III. SECTION 74.1107 REPRESENTS A REASONABLE RESTRICTION IN THE PUBLIC INTEREST AND DOES NOT VIOLATE THE FIRST AMENDMENT TO THE CONSTITUTION.

In its brief, TeleSystems makes two primary First Amendment arguments -- first, that Section 74.1107 violates its "Constitutionally protected right of freedom of speech" in that it unlawfully interferes with its right to receive and distribute communications through the use of a CATV system (Br. 37-40), and second, that the Commission has not "established a public interest factor" which could justify the abridgement of this First Amendment right (Br. 44-48).

We will direct our attention first to TeleSystems' contention that Section 74.1107 of the CATV rules restricts freedom of speech in violation of the First Amendment. While we agree with much of what appellant says with respect to the general application of the First Amendment, we point out, and indeed

appellant recognizes (Br. 42, 43), that its free speech argument has already been rejected in those cases where the Commission has denied a radio license to a common carrier seeking it for the sole purpose of serving a CATV whose operation threatened the validity of the only local television station, and which had not agreed to carry the local station and refrain from duplicating its programs, Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D. C. 93, 321 F.2d 359 (1963), cert denied 375 U.S. 951; Idaho Microwave, Inc. v. Federal Communications Commission, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965). The situation presented here, although it concerns the direct regulation of the CATV systems, rather than the grant of a microwave radio license to a CATV, is indistinguishable in terms of the limitations placed upon what the system may carry.

Notwithstanding appellant's vigorous assertions to the contrary (Br. 41-44), we submit that appellant's First Amendment argument is essentially foreclosed by the Supreme Court's decision in National Broadcasting Co. v. United States, 319 U.S. 190 (1943).[18/] There, the Supreme Court made clear that reasonable

18/Appellant argues (Br. 42) that the National Broadcasting Co. case is inapplicable since it applies to the regulation of transmission facilities, rather than reception facilities such as CATVs. As discussed in Section I, supra, however, CATVs are not merely reception facilities but "receive, electronically reproduce and amplify, relay, transmit and distribute television programs." See United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (D.C. S.D. N.Y. 1966).

regulation of the use of the radio spectrum in the interest of the general public is not a violation of the First Amendment. That case sustained regulations adopted by the Commission to regulate the relationship between radio stations and networks. The Court took account of the chaos which orderly regulation had supplanted and found that, "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio," and did so in such a manner as to "preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest'", 319 U.S. at 217. The Court concluded, 319 U.S. at 227:

> * * * The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity". Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Assuming that the Commission has the authority to limit the extension by CATV of television broadcast signals into new areas, the National Broadcasting Co. case makes clear that such a limitation raises no substantial free speech question. For the regulation at issue here is merely another aspect of

regulation of use of the air waves. CATV systems constitute a part of the scheme of television distribution which, unlike other modes of expression, make use of radio signals as a *sine qua non* of their operation.[19/]

We submit that the Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. It is irrelevant that the CATV systems do not themselves use the air waves in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service. Indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it. And herein can be found the public

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19/ In 1955, when CATV was in an initial stage of development, this Court stated: "The Commission will presumably assert jurisdiction to regulate community antenna systems if and when it concludes that such systems provide or are adjuncts of a broadcast service. Its failure thus far to assert such jurisdiction, standing by itself cannot support a conclusion that the systems are not service within the meaning of the rule. It is unrealistic to overlook the fact that, through the community systems, Clarksburg residents are receiving and are in a sense, being served by the programs of the Wheeling station. * * * (Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D. C. 211, 217, 225 F.2d 511, 517 (1955).)"

interest considerations which appellant claims are lacking.

Thus, in its Second Report and Order adopting the current CATV regulations, the Commission found, 2 F.C.C. 2d at 771, that "Congress and the American public have staked a great deal on the development of UHF," and that there has been a strong indication in recent years of a trend favorable to UHF. Even more rapid, however, has been the growth of CATV. "The most critical question posed", the Commission stated, "is how these two trends mesh in the ensuing years", 2 F.C.C. 2d at 772. The purpose of Section 74.1107 is to assure that these developments progress in an orderly manner. Toward this end, it provides a regulatory framework within which the growth of CATV in the major markets of the country will not be indiscriminate and uncontrolled, but will be measured against the paramount public interest.

The restriction placed on TeleSystems is a limited one and may be only temporary in effect. The rules contain no imposition whatever on appellant's right to originate its own programs. No limitation on its freedom of expression is involved. It is restricted only in the use it makes of signals broadcast by others.[20/] And in this connection, Section 74.1107 provides only

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20/ Weaver v. Jordan, 411 P.2d 289 (Calif. 1966), cert. den. 385 U.S. 844 (Br. 48, fn. 100), is therefore not in point. In that case, the Supreme Court of California struck down, as inconsistent with the First Amendment, an absolute prohibition against the origination of programs by a wire Pay-TV system, but the Court emphasized that its holding was based upon the sweeping nature of the prohibition. That decision, in our view, is quite inapplicable to the kind of limited regulation embodied in the Commission's CATV rules.

that the public interest be ascertained before the programs of a television station are extended beyond the area that would ordinarily receive its signals off the air. Thus, the Commission has not finally resolved whether the effect of CATV on UHF will be harmful nor, conversely, whether CATV provides competitive stimulation. All that the Commission has done is to recognize that a substantial problem exists which requires further examination on a case-to-case basis. If TeleSystems demonstrates that its proposal is consistent with the public interest, its request to import the signals of the New York stations will presumably be granted.

In sum, as the Commission stated, 6 F.C.C. 2d at 311, "it can hardly be contended, in light of the existing authorities, that the right of free speech includes the right of a party subject to the Act's jurisdiction (here an interstate communication by wire) to extend the service area of a television station beyond the area authorized by the Commission in a manner inconsistent with the public interest." Since, as we have shown, Section 74.1107 is reasonably related to valid public interest objectives, it represents a proper exercise of the authority granted the Commission under the Communications Act.

CONCLUSION

For the foregoing reasons, the Commission's decision should be affirmed.

Respectfully submitted,

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March 14, 1967

APPENDIX A

COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151) states that the purpose of the act is the regulation of interstate and foreign commerce in communication by wire and radio, and that to efficiently achieve this purpose, authority over such commerce is centralized in the Commission. Section 2 (47 U.S.C. 152) states that the "provisions of this Act" shall apply to "all interstate communication by wire or radio * * * and to all persons engaged within the United States in such communication * * *." These terms are defined in section 3 of the act. Section 3(a) defines wire communication as the "transmission of * * * pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission." Section 3 (b) defines communication by radio as the "transmission by radio of * * * pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by wire or radio. They transmit "pictures, and sounds * * * by aid of wire" and are "instrumentalities * * * (used for) * * * the receipt, forwarding, and delivery of communications * * * incidental to such transmission," and hence fall within the definition of wire communication under section 3(a).[1] Moreover, CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber) - a chain which "is now well established * * * as interstate communication." Capital City Telephone Co., 3 FCC 189, 193 (citing Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266).[2] The law is

1/ It can be argued that CATV systems, in receiving, forwarding and delivering the station's signal to the viewing public, are the instrumentalities incidental to the transmission of the signal and hence fall within the definition of "communication by radio" in sec. 3(b). However, it is unnecessary to consider this argument in view of the discussion above as to sec. 3(a) and the scope of the Commission's proposals. Since CATV operations clearly fall within Sec. 3(a) and/or Sec. 3(b), a determination of their precise status is not essential to the question of the Commission's jurisdiction to proceed as proposed in the notice of inquiry and proposed rulemaking.

2/ Congressional approval of the Capital City doctrine was expressed (contd.)

clear that the mere location of communication facilities wholly within one State does not establish that the communication service rendered over such facilities is an intrastate service, and that a communications service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one State. California Interstate Telephone Company v. F.C.C., 328 F. 2d 556 (C.A.D.C.); Ward v. Northern Ohio Telephone Co., 300 F. 2d 816 (C.A. 6), cert. den. 371 U.S. 820; Pacific Telatronics, Inc., FCC 64-1180, 4 R.R. 2d 145 (1964). CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, Clarksburg Publishing Co. v. F.C.C., 225 F. 2d 511, 517 (C.A.D.C.), and hence constitute "interstate communication by wire" to which the provisions of the act are applicable (secs. 2(a), 3(a)). See American Trucking Association v. United States, 344 U.S. 298, 311. 3/

With respect to the Commission's authority to adopt the rules proposed in the notice of inquiry and proposed rulemaking, i.e., the "provisons of [the] act" that are to be applied to CATV systems, there are the following sections: Sections 1, 4(i), 303 (f), (h), (p), and (r), 307(b), 315, 317, and 508. But the crucial sections would appear to be 1, 307(b), 4(i), and 303(f), (h), and (r). As the notice and the report and order in dockets Nos. 14895 and 15233 make clear, the existence and growth of CATV systems threaten to impede realization of the Commission's television assignment plan and policies under sections 1 and 307(b) (i.e., the sixth report and order). 4/ See Carter Mountain

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2/ (contd.) in connection with the 1960 amendment to sec. 202(b). See 105 Congressional Record at 6256.

3/ It is, we believe, significant that in sustaining the jurisdiction of the Interstate Commerce Commission in American Trucking the Supreme Court relied solely upon provisions of the Motor Carrier Act that are, in the circumstances, analogous to secs. 2 and 3 of the Communications Act. Compare 49 U.S.C. 302(a) and 303(a)(19) with 47 U.S.C. 152 and 153(a) and (b).

4/ In addition, as noted in the notice, there exists the potential to frustrate the purposes of the act embodied in secs. 303(p), 310, 315, 317, and 508 (and certain Commission regulations).

Transmission Corp. v. F.C.C., 321 F. 2d 359 (C.A.D.C.), cert. den. 375 U.S. 951 (1963). The Commission has authority under sections 4(i), 303(f), 303(h), and 303(r) to-

> perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions (4(i));
>
> make regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act * * * (303(f));
>
> establish areas or zones to be served by any station (303(h));
>
> make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this act * * * (303(r)).[5]

The foregoing provisions (4(i), 303(f), 303(h), and 303(r)) give the Commission broad rulemaking authority to carry out the provisons of this act (e.g., secs. 1 and 307 (b)) with respect to communications or persons coming within the Commission's jurisdiction (including CATV-sec. 2(a)). Section 303(h), in particular, was affirmatively designed to assist the Commission in effectuating the fair and equitable distribution of broadcast service called for by section 307(b).[6] The Commission's authority

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5/ Secs. 303(f), (h), and (r) are preceded by the following clause:

> "Except as otherwise provided in this act, the Commission from time to time, as public convenience, interest, or necessity requires shall * * * "

6/ Sec. 303(h) was copied from the Radio Act of 1927 and originated in preceding bills to amend the Radio Act of 1912. For the legislative intent, see hearings on H.R. 5589 before the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st sess., pp. 40-41

to issue rules establishing the area or zone to be served by any station for this purpose includes the power to prevent infringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act). Hence, it clearly encompasses, we believe, the authority to prescribe by rule the conditions under which the station's signal may be extended beyond the area or zone to be served by the originating station, by means of CATV--an "interstate communication by wire" to which the act's provisions are applicable (secs. 2(a) and 3(a)).

Moreover, apart from section 303(h), the general rulemaking power of the Commission (secs. 4(i) and 303(r)) includes authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) by CATV. In National Broadcasting Co. v. U.S., 319 U.S. 190, 215-220, the Supreme Court citing, inter alia, sections 1, 303(f), and 303(r), stated that:

> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio * * * In the context of the developing problems to which it was directed, the act gave the Commission not niggardly but expansive powers.

Under such "expansive" and "comprehensive" powers,[7/] the Commission has authority to take reasonable and appropriate action, including promulgation of rules, "as may be necessary" to carry out the provisions of section 307(b)-to insure that the regulatory scheme embodied in that section (the equitable distribution of service) and section 303 is not frustrated by the operation of CATV, an "interstate communication by wire" to which the act's provisions are applicable. This authority does not depend on a specific reference to CATV or CATV practices in the act. United States v. Storer Broadcasting Co., 351 U.S. 192, 203. See also, National Broadcasting Co v. United States, 319 U.S. 190, 218-219, where the Supreme Court stated:

7/ See also Stahlman v. F.C.C., 126 F. 2d 124, 128 (C.A.D.C.). For the intended comprehensive scope of Commission authority see, e.g., the following legislative history of the Radio Act of 1927, which was reenacted in all substantial respects in the Communications Act of 1934 (78 Congressional Record 8822-8823, 10313-10314, 10990): 66 Congressional Record 5479; S. Rep. 772, 69th Cong., 1st sess , pp. 2, 3.

True enough, the act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic * * *. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalog of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.8/

8/ The Court, in referring to provisions of the act such as secs. 303(g) and (r), stated (319 U.S. at 217-218):

> "These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' We cannot find in the act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a signal service over the two stations, thus wasting a frequency otherwise available to the area. The language of the act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses."

To the same effect in other fields, see Houston, East and West Texas Railway Co. v U.S. 234 U.S. 342; U.S. v. Wrightwood Dairy Co., 315 U.S. 110; U.S. v. Pennsylvania R. Co., 323 U.S. 612; American Trucking Assoc. v. U.S. 344 U.S. 298; Public Service Commission of State of New York v. Federal Power Commission, 327 F. 2d 893, 897 (C.A.D.C.).9/

The American Trucking case is particularly pertinent. The Supreme Court there sustained ICC rules "aimed at conditions [trip-leasing] which may directly frustrate the success of the regulation undertaken by Congress." After citing sections analogous to section 307(b) in our situation, the Court stated (344 U.S. at 311):

> Included in the act as a duty of the Commission is that "to administer, execute and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulation, and procedure for such administration." And this necessary rulemaking power, coterminous with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation" regulation of which is vested in the Commission by 202(a). See also 203(a)(19).

We point out that section 204 (a)(6) of the Motor Carrier Act is substantially similar to sections 303(r) and 4(i) of the Communications Act; while in the circumstances, sections 202(a) and 203(a)(19) of that act are closely analogous to sections 2(b) and 3(a) of the act. Further, the Court reached its conclusion "despite the absence of specific reference to leasing practices in the act," stating (at pp. 309-310):

9/ The Public Service Commission case sustained the power of the Federal Power Commission to issue temporary certificates to protect producers, although sec. 7(c) of the Federal Power Act expressly authorized such action only to protect customers, on the basis of the broad provisions of sec. 16 of that act which are virtually the same as sec. 303(r) of the Communications Act. The Court stated (327 F. 2d at 897): "All authority of the Commission need not be found in explicit language. Sec. 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation."

> Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific considerations of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience either in fact or in the minds of Congress, does not exist. National Broadcasting Co. v. United States, 319 U.S. 190, 219-220; * * *. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created * * *.

See also, Public Service Comm. of N.Y. v. FPC, 327 F. 2d 893, 896-97 (C.A.D.C.).

Of course, the rules must be "reasonably necessary and fairly appropriate" for the protection of the regulatory scheme. Colorado Interstate Gas. Co. v. Federal Power Commission, 142 F. 2d 943, 952 (C.A. 10). See also, American Trucking Assn. v. U.S., 344 U.S., at 314-315; National Broadcasting Co. v. U.S., 319 U.S. at 219 ("Generalities unrelated to the living problems of radio communication cannot justify exercises of power by the Commission"). 10/ The report and order in dockets Nos. 14895 and 15233 demonstrates the appropriateness and necessity of rules requiring all CATVs to carry local stations without duplication for a reasonable period. Moreover, the Carter Mountain decision establishes the reasonableness of the requirements. In affirming the Commission, the Court stated that "this does not appear to us an unreasonable condition," but rather "a legitimate measure of protection for the local station and the public interest" (321 F 2d 359, at 363-364). The notice of inquiry

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10/ The Commission clearly has no jurisdiction over bowling alleys or theaters, for example, as an administrative agency has no greater power than has been conferred by Congress. Stark v. Wickard, 321 U.S. 288; NLRB v. Atlantic Metallic Casket Co., 205 F. 2d 931 (C.A. 5). Cf. Peters v. Hobby, 349 U.S. 331. However, unlike bowling alleys and theaters, CATV systems intercept and extend the signals of television stations, and thus have a uniquely close relationship to the regulatory scheme. Moreover, CATV systems are engaged in interstate communication by wire to which the act's provisions are expressly applicable.

and proposed rulemaking similarly demonstrates the validity of the Commission's concern as to the effect of CATV on independent stations and programming sources, as well as on the development of UHF in the larger markets.

In conclusion, it would appear that under the broad regulatory powers vested in it by the Communications Act, the Commission presently has jurisdiction over all CATV systems, whether microwave is used or not; that there are pertinent provisions of the act applicable to the exercise of authority over such systems (in particular, secs. 1, 4(i), 303(f), 303(h), 303(r), 307(b), and 403); and that the proposed rules and inquiry represent a reasonable exercise of that authority in the circumstances.

APPENDIX B

Communications Act of 1934

Sec. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Sec. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

Sec. 3. For the purposes of this Act, unless the context otherwise requires--

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * *

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

Sec. 4(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall --

* * *

(h) Have authority to establish areas or zones to be served by any station;

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

Sec. 307(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Sec. 312 (b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

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BRIEF FOR INTERVENOR,
WESTINGHOUSE BROADCASTING COMPANY, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,387

TELESYSTEMS CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

PHILADELPHIA TELEVISION BROADCASTING CO.,
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.
WESTINGHOUSE BROADCASTING COMPANY, INC.,

Intervenors.

On Appeal from a Decision of the
Federal Communications Commission

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March 14, 1967

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STATEMENT OF QUESTIONS PRESENTED

The issues presented by the instant appeal, as agreed to in a prehearing stipulation accepted by the Court, are correctly set forth in appellant's opening brief (pp. i-ii).

The Court will note that appellant has decided not to press the first stipulated question there presented (App. Br. p. i).

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BRIEF FOR INTERVENOR, WESTINGHOUSE BROADCASTING COMPANY, INC.

COUNTERSTATEMENT OF THE CASE

To avoid being needlessly repetitive, intervenor Westinghouse Broadcasting Company, Inc. ("Westinghouse") adopts appellee's Counterstatement of the Case.

SUMMARY OF ARGUMENT

1. CATV systems are engaged in communications by wire in interstate commerce, to which the Communications Act is specifically made applicable. 47 U.S.C. Sec. 152(a). They are in practical effect, as well as in legal contemplation, an adjunct of television broadcasting and a means by which television signals are furnished to the public. *Clarksburg Publishing Co. v. Federal Communications Commission*, 96 U.S. App. D.C. 211, 217, 225 F. 2d 511, 517 (1955). Lest the unregulated growth of CATV systems defeat the basic purposes of the Communications Act, the Commission has ample authority to adopt rules designed to prevent the growth of CATV systems from frustrating the Commission's statutory duty to make available, so far as possible, to all the people of the United States, a broadcast service equitably distributed among the several States and communities. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359, *cert. den.*, 375 U.S. 951 (1963); 47 U.S.C. Sec. 307(b); see also *American Trucking Associations v. United States*, 344 U.S. 298 (1953).

2. The fact that Rule 74.1107, grandfathering CATV operations begun before February 15, 1966, was not published in the Federal Register until March 17, 1966 does not make it a retroactive regulation. The rule became effective on the date of its publication in the Federal Register (March 17, 1966). It does not purport to make illegal any operations engaged in prior to that date. It allows CATV systems to continue to carry all signals which they had on their cable prior to a specified date (February 15, 1966). With respect to any signals placed on their systems after that date, their carriage would have to be shown to be in the public interest, a fact of which CATV operators had been forwarned by a Commission Public Notice released February 15, 1966 (Mimeo 79927). The Commission's action making its new CATV rules

effective upon their publication, rather than 30 days thereafter, was a valid exercise by the Commission of its discretion in this area (see 5 U.S.C. Sec. 1003(c)).

3. The CATV rules which appellant challenges, adopted in furtherance of the Commission's statutory duties, do not violate the free speech provisions of the federal Constitution. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F.2d 359, *cert. den.*, 375 U.S. 951 (1963).

ARGUMENT

I

The Challenged CATV Regulations Are Within the Commission's Competency

It is appellant's position, summarily stated, that Sections 74.1105 and 74.1107 of the Commission's Rules constitute an unlawful regulation of television *reception* and an unlawful attempt to *license* CATV systems (App. Br., pp. 12, 18-27). We think neither contention is sound.

When Congress established the Federal Communications Commission in 1934, it conferred on that agency broad powers over "*all* interstate and foreign communication by wire or radio" and over "*all* persons engaged within the United States in such communication" (47 U.S.C. Sec. 152(a)).[1] The term "communication by wire" was there defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds *by aid of wire*, cable, or other like connection *between the points of origin and reception* of such transmission, including *all* instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and *delivery* of communications) incidental to such transmission" (47 U.S.C. Sec. 153(a)).

[1] Emphasis supplied throughout this brief.

For the purpose of providing a rapid, efficient, nation-wide and world-wide wire and radio communication service "to *all* the people of the United States" (47 U.S.C. Sec. 151), the Commission was directed by Congress to provide a fair, efficient, and equitable distribution of radio service "among the several States and communities" (47 U.S.C. Sec. 307(b)), and to that end empowered "to establish areas or zones to be served by any station" (47 U.S.C. Sec. 303(h))

The "radio service" which the Commission is thus under a mandate to distribute equitably among the several states and communities comprehends both "transmission service" (*i.e.*, "the opportunity which a radio station provides for the development and expression of *local* interests, ideas and talents and for the production of radio programs of special interest to a *particular* community") and "reception service" (*i.e.*, "the presence in any area of a listenable radio signal"). *WSIX Broadcasting Station*, 8 RR 216, 217 (1952). As there further stated by the Commission (p. 218):

> "A basic purpose of the Commission's television assignment plan is the furnishing of *local* television service to *individual* communities. That *service* consists of two basic elements. First, the transmission of a television signal; second, and *equally* important is the availability of a *local* television facility to the *community*."

As succinctly put by the Supreme Court, the equitable distribution requirements of Section 307(b) are "furthered by a recognition of local needs for a *community* radio *mouthpiece*." *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (1955).

Aware of the importance of local outlets, the Commission had no illusions, even as early as 1945, that the 13 VHF channels which it there set aside for television use would not provide enough outlets for a nation-wide competitive television system. *Second Report on Deintermixture*, 13 RR 1571, 1575, para. 12 (1956); see 1 RR Pt. III, pp. 91: 97-98 (1945).

Accordingly, in its Sixth Report of April 14, 1952, issued after a four-year study and a four-year freeze on new grants (1948-1952), the Commission added 70 UHF channels (Channels 14 through 83) to the 12 VHF channels theretofore authorized for television use. *Sixth Report*, 1 RR Pt. III, 91:661-665 (1952). Basic to its 1952 report, which allocated specific channels to designated cities,[1] was the assumption (then justified but disproved by subsequent developments) that the "intermixture" of VHF and UHF channels in the same major markets would compel the manufacture of nothing but all-channel receivers (1 RR Pt. III, 91:661, para. 189), and that the new UHF channels would become in due course "an integral part of a *single*, nationwide television service" (1 RR Pt. III, 91:664, para. 197).

As this Court knows, with important markets flooded with VHF only sets, UHF channels "went begging". It eventually became apparent to both the Commission and to Congress that drastic remedial action was needed if we were not to end up with a television system bottomed on 12 rather than 82 channels. Congress accordingly enacted all-channel receiver legislation in 1962 empowering the Commission to require that apparatus designed to receive television pictures be capable of receiving "all frequencies allocated by the Commission to television broadcasting" (47 U.S.C. Sec. 303(s)); *Cf.* H. Rept. No. 1559, 87th Cong., 2d Sess., 2-6; S. Rept. No. 1526, 87th Cong., 2d Sess. 2-5.

However, before the benefits of such legislation could be translated into actual UHF operations in the larger markets, it appeared that the growth of UHF was about to be stymied once again by an intervening untoward development — the piping by CATV systems of VHF signals from distant stations (*e.g.*, New York, Los Angeles, and Chicago) into the other top 100 markets, many of which could otherwise support additional television stations of their own on allocated but still unactivated channels.

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[1] The allocation table which the Commission thus adopted in 1952 in furtherance of Section 307(b) was sustained by this Court. Logansport Broadcasting Corp. v. United States, 93 U.S. App. D. C. 342, 210 F.2d 24 (1954).

The Commission was well aware of the importance of a multiplicity of local outlets in markets which could support such operations. It knew that it was under a duty to bring "to *all* the people of the United States", both rural and urban, a wire and radio communication service (47 U.S.C. Sec. 151). It knew that such service, both transmission and reception, should be equitably apportioned among the several States and communities — with such service not restricted to a centralized source (47 U.S.C. Sec. 307(b)). In furtherance of this mandate and in line with expressly confirmed authority "to establish areas or zones to be served by any station" (47 U.S.C. Sec. 303(h)), the Commission had long imposed ceilings on the power with which broadcasters could operate. *Cf. Goodwill Stations, Inc. v. Federal Communications Commission,* 117 U.S. App. D.C. 64, 69, 325 F.2d 637 (1963). Rules prohibiting "duopoly", "undue concentration", and related evils were all designed to limit an individual licensee's "sphere of influence", and to create greater program diversity.

Though initially slow to move, the Commission eventually realized that its television allocation table, its desire for more rather than fewer transmission outlets, and its goal of bringing multiple reception and transmission services and mouthpieces to individual communities were in grave danger of being vitiated in the event burgeoning CATV systems were allowed to pipe distant signals by wire and by radio into communities which the Commission had theretofore concluded could support live stations of their own.

Accordingly, in its Second CATV Report in March 1966, 2 F.C.C. 2d 725 (1966), the Commission laid down rules prohibiting CATV systems from hereafter piping distant signals into the top 100 markets without the Commission's prior consent. Those sections relate only to the use made of television broadcast signals, and they limit that use only for the purpose of maintaining both local "free" television service and CATV service as coordinated components of a nation-wide television system.

The sections of the CATV rules which appellant challenges were adopted in furtherance of basic statutory provisions. CATV systems clearly constitute "wire communication", as that term is defined in 47 U.S.C. Sec. 153(a), a fact conceded by appellant (App. Br., p. 13). And since all television signals constitute "interstate transmissions" (47 U.S.C. Sec. 153(e)), wire lines and other equipment utilized in delivering such transmissions to the home receiver are in practical effect, as well as in legal contemplation, a part of the transmission of the television signal to the public, a fact long ago recognized by this Court. *Clarksburg Publishing Co. v. Federal Communications Commission*, 96 U.S. App. D.C. 211, 217, 225 F.2d 511, 517 (1955); see also *Idaho Microwave, Inc. v. Federal Communications Commission*, 122 U.S. App. D.C. 253, 256, 352 F.2d 729 (1965). Accordingly, under its "comprehensive powers to promote and realize the vast potentialities of radio", the Commission is fully empowered to preclude any transmissions by wire or by radio which would defeat the basic aims of the Communications Act. *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943); *American Trucking Associations v. United States*, 344 U.S. 298 (1953). With all deference to appellant's contrary assertions (App. Br., pp. 15-16), the Commission's regulatory authority is not confined to "radio stations" and to "common carriers". It extends to *all* communication by wire or radio — by licensees and non-licensees, by common carriers and non-common carriers.

It can scarcely be denied that CATV systems "physically intercept and extend television signals, and thus have a uniquely close relationship with the regulatory scheme embodied in Sections 303(h) and 307(b)", a fact emphasized by the Commission and acknowledged by appellant (App. Br., p. 18). *Second Report and Order*, para. 12, 2 F.C.C. 2d 725, 730 (1966). Television signals are a *sine qua non* to CATV operations of the type appellant is proposing. Empowered and directed as it is to provide a radio service "to all the people", and to see that television transmission and reception is equitably distributed among the several States and communities, it necessarily follows that the Commission is

under a duty to prevent CATV systems from picking up and distributing television signals in such a fashion as to frustrate the Commission's TV allocation table, its policy of encouraging local facilities, its prohibitions against undue concentration, and other basic goals.

The Commission's decision to regulate CATV systems "as adjuncts of the nation's broadcasting system" rather than as "common carriers" has been heretofore sustained by this Court. *Philadelphia Broadcasting Co. v. Federal Communications Commission*, 123 U.S. App. D.C. 298, 359 F.2d 282 (1966). With respect to persons subject to its regulatory power, the Commission has ample authority to prevent any extension of television signals, by wire or radio communications, which would defeat the basic purposes of the Communications Act. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F.2d 359, *cert. den.*, 375 U.S. 951 (1963).[1] In both the common carrier and broadcast field, the Commission is under a mandate to "make available, so far as possible, to *all* the people of the United States", an adequate and efficient service. The Commission is not powerless to prevent the frustration of its basic policies "by persons subject to the Act merely because the licensing provisions of the statute are inapplicable to them". 47 U.S.C. Sec. 312; *Second Report and Order*, para. 12, 2 F.C.C. 2d 725, 730 (1966); *American Trucking Associations v. United States*, 344 U.S. 298 (1953).

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[1] Appellant's attempt to distinguish Carter Mountain on the ground that microwave (not wire line) facilities were there involved (App. Br. pp. 42-43) is not persuasive. There the Commission rejected Carter Mountain's application unless the separately operated CATV system which it proposed to serve agreed to protect the programming of a local television station. Carter Mountain there contended that it could not control (and should not be required to control) the end use of the signals it thus provided to a CATV system. The carriage and non-duplication requirements there imposed on the CATV system were sustained. The rationale of Carter Mountain is no less applicable to signals furnished by wire line than those provided by radio. In recognizing, as appellant apparently does (App. Br. pp. 16-17), that the challenged sections of the rules would be valid with respect to microwave-fed CATV systems, appellant undercuts any contention that comparable restrictions would not apply equally to wire-fed CATV systems.

II

The Challenged CATV Regulations Were Not Adopted in Contravention of the APA

On the premise that Sections 74.1105 and 74.1107 were made effective more than 30 days before their publication in the Federal Register, appellant argues that the rules in question contravene Section 3(a)(3) and 4(c) of the Administrative Procedure Act (5 U.S.C. Sec. 1002(a)(3) and 1003(c)). The argument is without merit.

Section 74.1107(d) states that the prohibitions against bringing signals from distant stations into the top 100 markets shall not be applicable to signals which a CATV system was supplying its subscribers on or before February 15, 1966. However, with respect to any signals brought into the market after that date, prior Commission consent would be required. On the premise that the full text of the rule was not published in the Federal Register until March 17, though the basic features thereof were set forth in a Commission Public Notice of February 15, 1966, TeleSystems contends that the rule is "retroactive" in one sense, and is being given legal effect in another, more than 30 days before its official publication in the Federal Register.

TeleSystems misconceives the purport of the February 15, 1966 provision of Section 74.1107. That rule has no retroactive effect. The fact that the rule "grandfathers" operations commenced before February 15, 1966 was not an attempt by the Commission to apply its provisions retroactively. The rule became effective as of its publication date (March 17, 1966). Section 74.1107 does not purport to make illegal any CATV operations engaged in prior to that date. It merely provides that any CATV systems which operate after that date, and which bring in distant signals that they were not providing on the cut-off date there specified (February 15, 1966) must procure prior Commission approval. So as not to disturb long-established viewing habits, some form of grandfathering was clearly in order. *Cf. United States v. Maher*, 307 U.S. 148,

153 (1939); 3 F.C.C. 2d 820-822 (1966) (R. 9). In any event, where appropriate procedures are followed, the APA does not necessarily interdict the promulgation of *retroactive* rules. For example, in the Chain Broadcasting Proceeding, NBC was required to divest itself of one of its two networks, and in the "station rep" cases the networks were required to terminate existing sales representation contracts with their affiliates. Despite their retroactive application, both actions were sustained by this Court. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Metropolitan Television Company v. Federal Communications Commission*, 110 U.S. App. D.C. 133, 289 F.2d 874 (1961).

Furthermore, with all deference to TeleSystems, the Commission's decision to make Rule 74.1107 effective upon its publication in the Federal Register, rather than 30 days thereafter, was a valid exercise of its discretion in the light of the then burgeoning expansion of CATV systems, the danger that scores of CATV would otherwise be rushed into service, the need of prompt action to minimize future disruptions, and related considerations of administrative efficiency. Upon such a showing of "good cause" an administrative agency is expressly empowered by Section 4(c) of the APA to make its rules effective *immediately* upon their publication, rather than 30 days hence. Finally, since the rules which TeleSystems now challenges had been published in the Federal Register some 60 days before its cable system began bringing New York signals into the Philadelphia Metropolitan area on May 18, 1966 (R. 5), TeleSystems is in no position to quibble over their becoming effective on March 17 rather than April 17, 1966.

III

The Action Here Challenged Does Not Violate the First Amendment

Contrary to the appellant's contention (Br., pp. 37-48), the Commission's cease and desist order, bottomed on Section 74.1107 of its Rules, does not contravene the First Amendment. Such a contention

is essentially foreclosed by prior adjudications of this Court and of the Supreme Court in closely related situations. *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943); *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F.2d 359, *cert. den.*, 375 U.S. 951 (1963); *Idaho Microwave, Inc. v. Federal Communications Commission*, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965). As there noted, regulations reasonably related to valid public interest objectives are a valid exercise of powers which Congress has conferred on the Commission and do not contravene First Amendment freedoms.

Appellant's assertion that "neither Congress nor the Supreme Court has ever endorsed the concept of limiting the *reception* of broadcast signals" (App. Br., pp. 42 *et passim*), and that to do so would contravene the First Amendment (App. Br., pp. 37-48) will not stand close scrutiny. The 1934 Act itself explicitly prohibits a station from rebroadcasting the program of another station without the express authority of the originating station, a provision which limits reception and re-use of broadcast signals in "hippety-hop" fashion across the continent. 47 U.S.C. Sec. 325(a). Similarly, though inapplicable to broadcasting intended for the general public, Section 605 of the Act expressly interdicts the interception, divulgence or unauthorized use of all other "communication by wire or radio". 47 U.S.C. Sec. 605. And the Commission's power to place ceilings on height and power, thus limiting *reception*, has been repeatedly sustained by this Court. *Goodwill Stations, Inc. v. Federal Communications Commission*, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Commission's actions here appealed from should be affirmed.

Respectfully submitted,

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